# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 208

J. B. SMYTH, W. A. SMITH, AND UVALDE ROCK ASPHALT COMPANY, APPELLANTS,

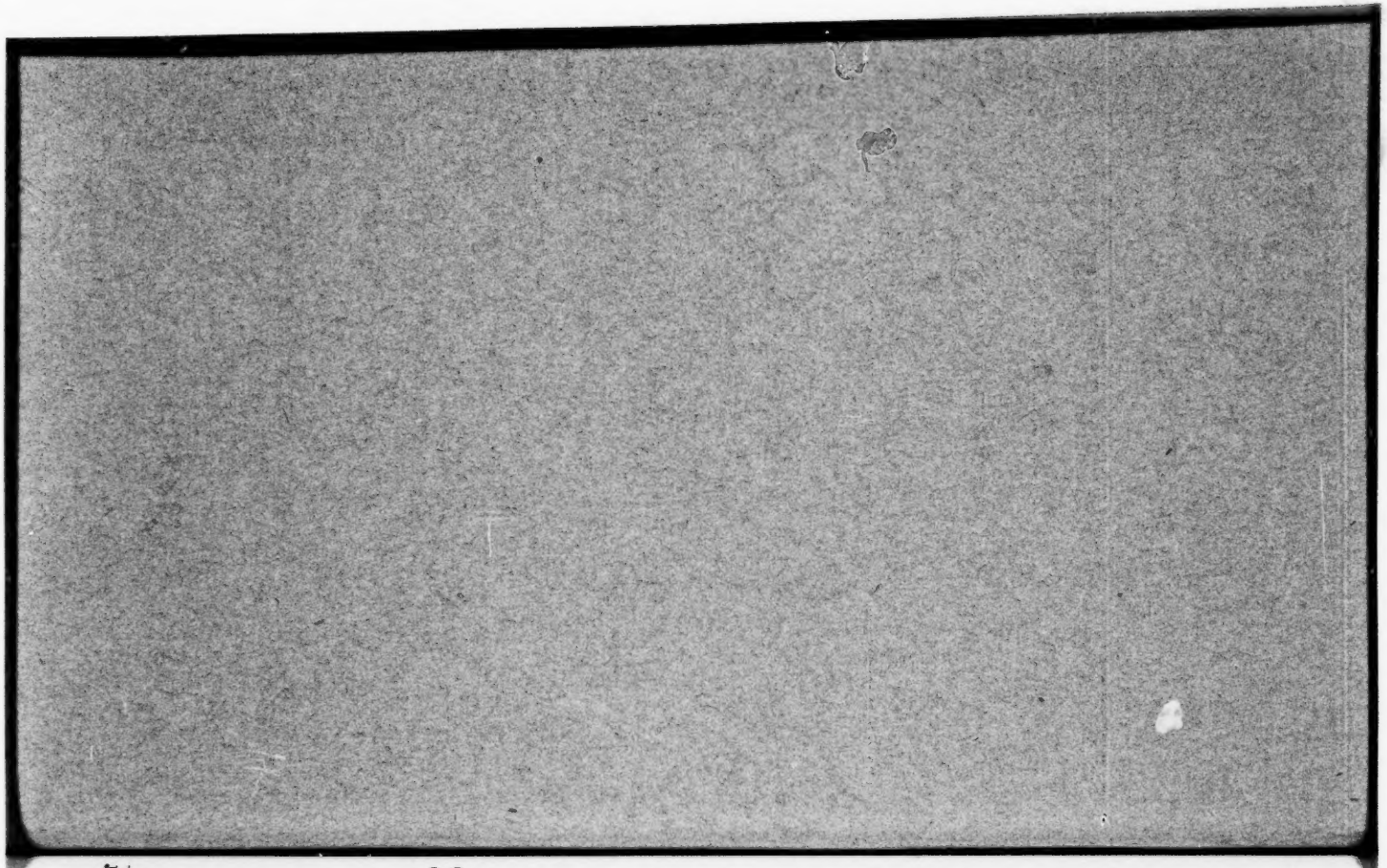
vs.

ASPHALT BELT RAILWAY COMPANY AND A. R. PONDER, RECEIVER, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, PURSUANT TO THE ACT OF CONGRESS OF SEPTEMBER 14, 1922

FILED OCTOBER 30, 1924

(29,931)



(29,931)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1923

# No. 621

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*vs.*

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UNITED STATES OF AMERICA:

## UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT

Pleas and proceedings had and done at a special term of the United States Circuit Court of Appeals for the Fifth Circuit begun on Wednesday, the seventeenth day of October, A. D. 1923, at New Orleans, Louisiana, before the Honorable Richard W. Walker and the Honorable Nathan P. Bryan, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

J. B. SMYTH et als., Appellants,

versus

ASPHALT BELT RAILWAY COMPANY et als., Appellees

Be it remembered, That heretofore, to-wit, on the 28th day of September, A. D. 1923, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 4214, as follows, to-wit:

## CAPTION.

BE IT REMEMBERED, That at a regular term of the United States District Court in and for the Western District of Texas, the Honorable DuVal West, United States District Judge, presiding, and holding its sessions at San Antonio, Texas, which said term began on the 7th day of May, A. D. 1923, and continued in session to and including the 14th day of September, A. D. 1923, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 267 In Equity.

J. B. SMYTH, W. A. SMITH AND UVALDE ROCK ASPHALT COMPANY,

versus

ASPHALT BELT RAILWAY COMPANY, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY AND A. R. PONDER, RECEIVER.

## BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS,
AT SAN ANTONIO.
J. B. Smyth, et al.
-vs-
Asphalt Belt Railway Company, et al.
In Equity No. 267.

TO THE HONORABLE DuVAL WEST, JUDGE OF SAID COURT:

NOW COME J. B. Smyth, W. A. Smith and Uvalde Rock Asphalt Company, and complaining of and against Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf Railroad Company, and A. R. Ponder, Receiver of the properties and assets of said San Antonio, Uvalde & Gulf Railroad Company, respectfully represent:

1.

Complainant J. B. Smyth is a citizen, resident and inhabitant of the County of Bexar, State of Texas, and of the Western District of said State. Complainant W. A. Smith is a citizen, resident and inhabitant of the County of Jefferson, State of Texas, and of the Eastern District of said State. Complainant Uvalde Rock Asphalt Company is a corporation created and existing under the laws of the State of Texas, and is a citizen, resident and inhabitant of said County of Jefferson, State of Texas, and of the Eastern District of Texas.

2.

The Defendants Asphalt Belt Railway Company and San Antonio, Uvalde & Gulf Railroad Company are railway corporations, created and existing under the laws of the State of Texas, with their principal offices and places of business in the City of San Antonio, Bexar County, Texas, in said Western District and each is a citizen, resident and inhabitant of said County, State and District, the President of said San Antonio, Uvalde & Gulf Railroad Company being A. R. Ponder of Bexar County, Texas, upon whom service may be had for said Company, and the President of Defendant Asphalt Belt Railway Company being H. P. McMillan of said City of San Antonio upon whom service may be had for said last named Company. The Defendant A. R. Ponder, Receiver, is the duly appointed, qualified and acting Receiver of the properties and assets of said San Antonio, Uvalde & Gulf Railroad Company, appointed by and acting under the orders of this Court in a certain cause pending upon the docket of this Court and is sued herein in his capacity as such Receiver, but not individually.

3.

That this suit is one arising under the Constitution and Laws of the United States and particularly under an Act of Congress entitled "An Act to regulate commerce", approved February 4, 1887, as amended by an Act of Congress entitled "An Act to provide for the termination of Federal control of Railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employes; to further amend an Act entitled 'An Act to regulate commerce', approved February 4, 1887, as

amended, and for other purposes," approved February 28, 1920; and involves a sum and value in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

4.

Complainants aver that the Defendant San Antonio, Uvalde & Gulf Railroad Company owns, and the Defendant Receiver operates, a line of standard gauge railroad extending from the City of San Antonio, Bexar County, Texas, to the City of Corpus Christi, Nueces County, Texas, with another line branching off from the San Antonio-Corpus Christi line at or near the town of North Pleasanton, Atascosa County, Texas, and running thence through the Counties of Atascosa, McMullen, LaSalle, Dimmit, Zavalla and Uvalde to the City of Uvalde in said last named County, with another branch line running south from Crystal City, Zavalla County, Texas, to Carrizo Springs, Dimmit County, Texas. That both of said Defendants last named are common carriers by railroad, subject to the Interstate Commerce Act, being the said Act of Congress approved February 4, 1887, as amended, and have been such common carriers by railroad, subject to said Act, since a date long prior to the occurrence of the matters and things herein alleged.

That the Defendant Asphalt Belt Railway Company was created by the filing with the Secretary of State of the State of Texas on the 9th day of June, A. D., 1923, of certain articles of incorporation, as provided by the laws of the State of Texas relating to the creation of railroad corporations. Upon information and belief Complainants aver that said last named Defendant was brought into ex-

istence at the instance of its co-Defendants; that its said co-Defendants supplied all funds and property used for the payment of its capital stock and that the Defendant Asphalt Belt Railway Company is entirely controlled and absolutely dominated in every respect by its co-Defendants herein, and is in fact their subservient creature, and is by them considered and treated and will be considered and treated as a mere division of the railroad owned and operated by them as aforesaid, and is their mere subsidiary corporation.

5.

That the defendants propose, and have undertaken to construct, maintain and operate the line of the Asphalt Belt Railway Company, from a point on the rails of the Defendant San Antonio, Uvalde & Gulf Railroad Company, at or near the station of Pulliam in Zavalla County, Texas; thence in a northwesterly direction a distance of about twenty (20) miles through Zavalla and Uvalde Counties in said State of Texas to a point in Uvalde County at or near the mines of the Texas Rock Asphalt Company about thirty (30) miles more or less west of said City of Uvalde. That the construction of said line of railroad to be owned by the Defendant Asphalt Belt Railway Company will in truth and in fact and to all intents and purposes amount to and be an extension of the existing line of railroad owned and operated as aforesaid by the Defendant San Antonio, Uvalde & Gulf Railroad Company and its Receiver.

That in pursuance of their said proposal and undertaking to construct said line of railroad in Zavalla and Uvalde Counties, the Defendant Asphalt Belt Railway Company, at the instance and upon the demand of its co-Defend-

ants herein, has heretofore presented to the County Judge of Uvalde County, Texas, its petition for the condemnation of certain lands more particularly described in said petition, a copy of which, marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof, for right of way and other railroad purposes for the line of railroad so undertaken to be constructed, and has caused the said County Judge to appoint Commissioners, as provided by the laws of the State of Texas, to assess the damages which will accrue to the Defendants named therein in case of such condemnation. Complainants further show that said Commissioners have caused the Defendants in said condemnation proceeding, to-wit: Complainants herein J. B. Smyth and W. A. Smith, to be served with notice of hearing upon the question of such damages and have set said matter for hearing before them, the said Commissioners, in the City of Uvalde, Texas, on the 31st day of July, 1923, at which time the Defendants herein, unless restrained, will insist, according to the best of Complainants' information and belief, upon the hearing and determination of said matter by said Commissioners.

6.

Complainants further allege, upon information and belief, that the Defendants herein have not applied, nor has either of them applied to the Interstate Commerce Commission to secure, and that neither has secured from said Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such proposed line of railroad not-

withstanding the requirements in that respect of Section 1 of said Interstate Commerce Act.

Upon information and belief Complainants further aver that even if said proposed line of railroad be not in truth and in fact an extension of the existing line of road of the San Antonio, Uvalde & Gulf Railroad Company, the defendants intend to operate the same as a standard gauge railroad and as a common carrier for hire engaged in the movement and carriage of passengers and freight in interstate and foreign commerce as defined in the said Interstate Commerce Act, and intend to and will, unless restrained, subject the same, if it be not already subjected, as a common carrier by railroad, to all of the terms and provisions of the said Interstate Commerce Act, and that the Defendants herein would not nor would either of them undertake to construct, maintain or operate said line of railroad if the traffic to be moved and handled thereon were to consist solely of passengers and freight moving solely and wholly between points within the State of Texas.

7.

Complainants, upon information and belief, further aver that the principal purposes and objects actuating the Defendants San Antonio, Uvalde & Gulf Railroad Company and A. R. Ponder, Receiver thereof, in the creation of the Asphalt Belt Railway Company, were to create a corporation subsidiary to the San Antonio Uvalde & Gulf Railroad Company. That said subsidiary corporation is to be controlled and dominated by said Railroad Company and owned and operated in common interest and for a common purpose and for the benefit of said Railroad Com-

pany; and in all practical and substantial respects and in legal effect and purposes is an extension of the road of said San Antonio, Uvalde & Gulf Railroad Company within the meaning of Section 1 of the Interstate Commerce Act. That the practical and legal effect of such conduct on the part of the defendants, if permitted, is and will be that the San Antonio, Uvalde & Gulf Railroad Company, a carrier subject to the Interstate Commerce Act, will have undertaken and will have effected the extension of its line of railroad and the construction of a new line of railroad, without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such new or extended line of railroad.

Complainants aver that the effort to construct said line of railroad in the name and title and as the property of Asphalt Belt Railway Company is a simple and obvious subterfuge. That if said Asphalt Belt Railway Company should be held to be a common carrier not subject to the Interstate Commerce Act, because only recently created, and not owning or operating any line of railroad engaged in interstate commerce, and that for that reason it might construct the proposed line of railroad without making itself subject to the Interstate Commerce Act, and without obtaining a certificate of convenience and necessity therefor from the Interstate Commerce Commission, the whole force and power of the Interstate Commerce Commission's authority to prevent construction would be destroyed; for that if the construction of this or any other twenty miles of railroad is permitted it will, when com-

pleted and put in operation, be compelled to handle interstate and foreign commerce by the necessities and for the convenience of the communities which it serves and therefore the Interstate Commerce Commission will have imposed upon it the necessity of determining, after construction and after large expenditures of money have been made and after the people in the various communities served by such railroads are asking for interstate service along with the state service, whether or not such railroad shall be permitted to be operated in interstate commerce by its owner, when both the letter and the spirit of the law, paragraph (18) of Section 1 of the Interstate Commerce Act as amended, require that all these questions shall be determined before and not after the construction has been accomplished. The spirit and purpose of the law is to prevent the expenditure prior to obtaining permission, if not approved by the Commission, and not to permit the Commission to be embarrassed by determining the question after the construction has been completed and expenditures have been made.

Your Complainants aver that their property can be taken only for public use; that the use claimed in this case is for the uses of a railroad company incorporated under the laws of the State of Texas. The Constitution of the State of Texas, Section 1, Article 10, declares that:

"Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared public highways and railroad companies, common carriers," and Complainants aver that under the provisions of the Texas Constitution every railroad constructed after the adoption thereof automatically is, becomes and remains, a

public highway, and every railroad company a common carrier and it may not legally refuse to accept and transport any traffic which may be offered to it regardless of the point of origin and destination from or to which such traffic may move. Complainants also allege that the effort to condemn the property of Complainants J. B. Smyth and W. A. Smith in advance of the issuance of such a certificate, for an alleged public use, through the incorporation of a railroad company, because of and by virtue of the fact that it does not presently own or operate a railroad and is not presently engaged in interstate commerce, is a manifest effort to evade the plain and binding provisions of the laws of the United States which prohibit the construction or the operation of a common carrier railroad engaged in interstate commerce without first obtaining a certificate of necessity and convenience as required by the aforesaid Interstate Commerce Act. That the contemplated extension is forbidden and prohibited by the laws of the United States and that the effort on the part of Defendants to condemn for a so-called public use is not only without warrant of law but is in direct violation of the laws of the United States which expressly prohibit the Defendants from making or undertaking any such extension. Accordingly, Complainants aver that the effort on the part of Defendants to condemn said property is wholly without authority, is void and is in violation of the laws of the United States and is a trespass upon the property of said Complainants against which Complainants have no legal, adequate, certain or sufficient remedy at law.

That by virtue of the premises the Defendants and each of them, have violated and are threatening a further

and continuous violation of the terms and provisions of Section 1 of said Interstate Commerce Act, and particularly of paragraph (18) of said Section, notwithstanding the pains and penalties provided in paragraph (20) of said Section, in that the Defendants have undertaken the extension of the existing line of railroad of the Defendant San Antonio, Uvalde & Gulf Railroad Company and are intending and threatening to engage in transportation under said Interstate Commerce Act over and by means of such new and extended line of railroad without first having applied for or obtained from the Interstate Commerce Commission a certificate as aforesaid and as required by Section 1 of said Act.

8.

That Complainants are entitled under and by virtue of the provisions of paragraph (20) of said Section 1 of said Act to have said construction, and said proceeding for condemnation in aid thereof, enjoined by this Honorable Court in that your Complainants are parties in interest, in this:

Complainants J. B. Smyth and W. A. Smith are the owners of the underlying fee simple title to the lands and premises sought to be condemned in the proceeding aforesaid, containing approximately forty-four (44) acres of land in Uvalde County, Texas, and also of other lands on both sides of the right of way so sought to be condemned aggregating about twenty thousand (20,000) acres, all subject, however, to certain rights of their co-Complainant, Uvalde Rock Asphalt Company, acquired by it from time to time for the mining, production and sale from said premises of certain minerals underlying the same, particu-

larly certain valuable deposits of a mineral commonly known as rock asphalt which is a porous or spongy limestone with the interstices partially or wholly filled with a natural asphalt or bitumen, extremely valuable for the construction of pavements, roadways, roofing, flooring and the like.

That Complainant, Uvalde Rock Asphalt Company, has been engaged for some years last past in mining and producing said mineral deposits from the lands of these Complainants contiguous to said proposed right of way, and in marketing and using the same, and has shipped in the past and now ships and will probably ship in the future for many years to come a large quantity of said rock asphalt, moving the same by railroad through Uvalde and other Counties of the State of Texas and into and through other States; the railroad shipments made by said Complainant during the year last past substantially exceeded one hundred thousand (100,000) tons of said mineral deposit. That said corporate Complainant being a heavy shipper by railroad within the State of Texas and points in other States is substantially interested not only in the construction of adequate lines of railroad but also in the maintenance of proper rates and of as low a system of railroad rates as will reasonably support the carriers by railroad engaged in the transportation business and is also interested in preventing ill-advised and excessively expensive railroad construction.

Complainants would further show that the individual Complainants herein are interested in the rock asphalt mined and to be mined by their co-Complainant to the extent of the royalty paid and to be paid them by it at the

rate of twenty-five cents (25c) per ton and that all of the Complainants are therefore interested in preventing any of said rock asphalt from being taken by the Defendants herein, or either of them, or any other person or corporation, without just compensation.

Complainants would further show that said mineral deposit does not occur, so far as they are informed or advised, under all of the lands owned by them as aforesaid, approximating twenty thousand (20,000) acres, but only occasionally and under comparatively small areas. The areas underlaid by said deposit are not uniform in shape or size but are irregular as to both and neither is said deposit uniform in depth or thickness where it occurrs, running in depth from practically nothing to twenty (20) feet or more; that said deposit lies almost entirely under the ground being usually covered with a surface coating of earth, stone, rock or other material averaging from eight (8) to forty (40) feet in thickness, between the surface of the ground and the top of the underlying deposit of rock asphalt.

That so far as your Complainants know or are advised there is only one method of determining with any degree of accuracy the quantity of said mineral deposits underlying any specified tract of land, that being to drill holes below the surface of the ground and to take cores or other particles of the material therefrom, and by the examination and observation of the cores or particles removed from such holes and the depths at which same are found, to determine whether any stratum of said material deposit underlies the point at which said hole is drilled and if so the thickness of the same and the distance thereof from

the surface of the ground; and by drilling successive holes, at intervals, to compute the yardage or tonnage of said deposit underlying the specified tract of land involved. That any investigation conducted as aforesaid is extremely expensive in that the average cost of drilling such test holes is the sum of, to-wit: Fifty Dollars ($50.00) each, and in order to make a substantially accurate computation of all strata of said deposit encountered under the proposed right of way of the Defendants herein would require the drilling of not less than two hundred (200) of such test holes at an aggregate cost of not less than, to-wit, Ten Thousand Dollars ($10,000.00).

Complainants would further show that the only reasonably economical method of mining said mineral deposit so far known to the art is the process commonly known as "strip mining", by which the surface covering of earth, stone and the like, superimposed upon said mineral deposit, is stripped or removed from the same by blasting, steam and hand-shovels and the like and by then blasting and otherwise removing the deposit, from its natural position, without the use of tunnels, shoring or sub-surface digging.

That said substance is so hard and compact that heavy blasting charges are required to break the same up into pieces convenient for handling and use and that the said blasting process when so carried on in the open air is inherently dangerous to persons and property in the vicinity thereof on account of the showers of rock, stone and other hard substances thrown into the air with great violence and for great distances by the force of such blasts and thus caused to be dropped upon and thrown against the surrounding territory, to the danger and probable damage of

all persons and property in the vicinity of such operations. By reason of the necessity of mining said mineral deposit by the method aforesaid it would be practically impossible to conduct any such mining operations within a distance of, to-wit, five hundred (500) feet from any standard railroad track except at large expense, including liability for damages to said track and to the persons, equipment and traffic moving thereover, or for insurance premiums to cover such liability; and your Complainants therefore aver that if the proposed right of way of the Defendants herein crosses or passes over any of the deposits of said mineral underlying their said lands, the natural and necessary effect of the condemnation thereof for railroad purposes would be to prevent Complainants from mining, producing and selling, not only the deposit lying immediately underneath said right of way, but also all such deposits lying within five hundred (500) feet of said right of way on either side thereof, and that the expense of test drilling or exploring a belt of land one thousand (1000) feet or more in width, being five hundred (500) feet on each side of the center line of said proposed right of way, would be proportionately greater than that required, as above alleged, to explore the strata under the proposed right of way alone, and would cost, in the opinion of Complainants, not less than One Hundred Thousand Dollars ($100,000.00).

Complainants are informed and believe, and upon information and belief allege, that the right of way sought to be condemned in said proceeding by the Defendant Asphalt Belt Railway Company does in fact cover and overlie a considerable quantity of said mineral deposit, in which Complainants are interested as aforesaid, and unless the

hearing and further prosecution of said condemnation proceeding, set as aforesaid for the 31st day of July next, is in some manner restrained and enjoined, your Complainants will be obliged either to expend enormous sums of money, as aforesaid, for the purpose of determining what damages they will suffer as a result of such condemnation, if allowed, or to prove only nominal damages where the actual damages will be excessive. And in this connection Complainants allege, upon information and belief, that a careful and skillful examination, by the methods above described, of the deposits underlying said proposed right of way, would show the damages of these Complainants, by virtue of the condemnation of said proposed right of way, to be in excess of the sum of Five Hundred Thousand Dollars ($500,000.00).

Complainants further allege that the cost and expense to them of so exploring below the surface of the land comprehended in the right of way sought to be condemned in the proceeding above referred to may not, according the information and belief of your petitioners, be recovered by them, or either of them, in said condemnation proceeding, or in any other suit or action as any part of the damages sustained by them in connection with the condemnation of said right of way. That, therefore, unless said unlawful condemnation proceeding shall be enjoined and restrained in advance of the hearing thereof before said Commissioners, your Complainants, by virtue of the premises, will sustain irreparable damage and injury.

Complainants further allege that they have no complete or adequate remedy at law and that the only remedy open to them by which they may avoid suffering such irrepar-

able damage and injury is the writ of prohibitory injunction which this Court is competent under the circumstances to issue.

WHEREFORE, Complainants aver that being parties in interest as contemplated by Section 1 of said Interstate Commerce Act they are entitled to have the construction of said proposed line of railroad, and the prosecution of said condemnation proceeding, obviously intended as a part and in aid of such construction, to be enjoined and restrained, unless and until the Defendants herein shall have obtained from the Interstate Commerce Commission a certificate as aforesaid.

Your complainants therefore pray that a subpoena or subpoenas in chancery may issue to the Defendants herein, and each of them, out of and under the seal of this Honorable Court requiring the Defendants, and each of them, to appear herein and answer this Complaint, but not under oath, answer under oath being hereby expressly waived.

Complainants also pray that upon hearing the Defendants, and each of them, and their and each of their officers, agents, attorneys, counsel, servants and employes be perpetually restrained and enjoined by this Honorable Court's most gracious writ of injunction from constructing and from undertaking the construction of said new or extended line of railroad in Zavalla and Uvalde Counties in State of Texas and from further prosecuting or attempting to prosecute said proceeding for condemnation, instituted by the Defendant Asphalt Belt Railway Company against the Complainants J. B. Smyth and W. A. Smith in Uvalde County, Texas, unless and until there shall have been ob-

tained from the Interstate Commerce Commission a certificate of public convenience and necessity, as provided in paragraph (18) of Section 1 of the Interstate Commerce Act. Complainants further pray that, pending a hearing herein, in order to prevent the infliction upon them, and the sustaining by them of the irreparable damage and injury aforesaid, there may be granted and issued a temporary restraining order or injunction pendente lite, or both, as the Court may be advised, restraining and enjoining the Defendants, and each of them, and their and each of their attorneys, officers, agents, counsel, servants and employes, in like terms until the further order of this Honorable Court.

Complainants further pray judgment against the Defendants, and each of them, for costs of court and for all such other and further relief, special and general, at law and in equity, as Complainants may, by virtue of the premises, be entitled to receive.

FRANK ANDREWS.
ROBERT H. KELLEY.
Solicitors for Complainant.

ANDREWS, STREETMAN, LOGAN & MOBLEY,
Of Counsel.
Union National Bank Building,
Houston, Texas.

STATE OF TEXAS
COUNTY OF BEXAR.

BEFORE ME, the undersigned authority, on this day personally appeared J. B. SMYTH, known to me to be a credible person, who being by me duly sworn deposes and says upon his oath that he has read over the above and fore-

going Bill of Complaint; that he is one of the Complainants named therein and makes this affidavit for himself and for his co-Complainants, being thereunto duly authorized; that the matters and facts in said Bill of Complaint set forth are, within his knowledge, true except such as are therein stated upon information and belief, and them he verily believes to be true.

J. B. SMYTH.

Sworn to and subscribed before me this the 23rd day of July, A. D., 1923.

R. L. HOGAN.

(Seal) Notary Public in and for Bexar County, Texas.

"EXHIBIT A"

IN THE COUNTY COURT,
UVALDE COUNTY, TEXAS.

STATE OF TEXAS
COUNTY OF UVALDE

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Asphalt Belt Railway Company, a railroad corporation organized and existing under the laws of the State of Texas, for the purpose of constructing and operating a line of railroad in Zavalla and Uvalde Counties, Texas, and complaining of J. B. Smyth and W. A. Smith, hereinafter styled defendants, would respectfully show unto the Court;

First: That the principal office of the plaintiff is in San Antonio, Bexar County, Texas, and that the defendant, J. B. Smyth resides in Bexar County, Texas, and the defendant W. A. Smith resides in Jefferson County, Texas.

Second: That the plaintiff is desirous of building and

operating a standard gauge steam railroad from a point on the rails of the San Antonio, Uvalde & Gulf Railroad Company about one mile south of the station of Pulliam, in Zavalla County, Texas, thence in a northwesterly direction into Uvalde County at a point near the mines of the Texas Rock Asphalt Company, all of said line of railroad to lie wholly within the State of Texas as provided for in its charter.

Third: That it is necessary for said railroad to pass through and over land belonging to defendants in Uvalde County, Texas, as follows:

All that certain tract, piece or parcel of land lying and being situated in Uvalde County, Texas, and being portions of the following original surveys:

Ft. Bend County School Land No. 317.
Ammon Underwood No. 318.
Jacob Hedrick No. 319
B. S. & F. No. 121
B. S. & F. No. 213.
G. C. S. F. R. R. No. 691.

said tract being more particularly described as follows: Being a strip of land lying on either side of the center line of the Asphalt Belt R. R. as now surveyed, located and staked out on the ground, the widths of said strip and its location with reference to said center line being as follows: from station 633/77.6 to station 660, 25 feet on each side; from station 660 to station 675, 50 feet on each side; from station 675 to 695, 25 feet on each side; from station 695 to 730, 25 feet on the south side and 75 feet on the north side; from station 730 to 742, 25 feet on each side; from station 742 to 750 50 feet on each side;

from station 750 to 784, 25 feet on each side, from station 784 to 840, 50 feet on each side; from station 840 to 855, 25 feet on each side; from station 855 to 867, 50 feet on each side; 867 to 875, 25 feet on each side; from station 875 to 880, 50 feet on each side; from station 880 to 888, 25 feet on each side; from station 888 to 890/62.0, 50 feet on each side. The above mentioned center line is described as follows: Beginning at a point in the north line of BS&F. Survey No. 129, 2est 660 feet from the N. E. Corner of said BS&F. survey No. 129, which point is the intersection of the north line of said survey with the center line of the Asphalt Belt RR, being station 635/77.6 of the location survey of said center line; thence from this point—and from a line through this point which bears N 61-56 W. and which makes an angle of 28-04' with the north line of BS&F survey No. 129, following the arc of a 4 degree curve to the right 929.6 feet to station 643/07.2; thence, N. 24-21' W. 225.6 feet to station 645/32.8; thence curving to the left with the arc of a 4 degree curve 1188 feet to station 657/20.8; thence N. 71-52" W, 63 feet to station 657/83.8; thence with the arc of a 2 degree curve to the right 769.5 feet to station 665/53.3; thence N. 56-29 W. 13 feet to station 665/66.3, which, due to an equation in the stationing, equals station 665; thence, continuing this same course, N. 56-29' W. 318.2 feet to station 668/18.2; thence with the arc of a 2-30' curve to the left 3030 feet to station 698/48.2; thence S. 47-46' W. 6652.2 feet to station 765/00.4; thence with the arc of a 2 degree curve to the left 631.3 feet to station 771/31.7; thence S. 35-38' W. 47.7 feet to station 771-79.4 which due to an equation in the stationing, equals station 773; thence continuing

on the same course, S. 35-38' W. 139.8 feet to station 774/39.8; thence with the arc of a 6 degree curve to the right 1362.5 feet to station 788/02.3; thence N. 63-07' W. 614.1 feet to station 794/16.4; thence with the arc of a 4 degree curve to the left 556.6 feet to station 799/83.0; thence N. 68-47' W. 2601.5 feet to station 825/84.5; thence with the arc of a 4 degree curve to the left 427.7 feet to station 830/12.1; thence N. 85-54' W. 587.1 feet to station 835/99.3; thence with the arc of a 1 degree curve to the right 800 feet to station 843/99.3; thence N. 77-54' W. 354.6 feet to station 847/53.9; thence with the arc of a 4 degree curve to the left 487.5 feet to station 852/41.4; thence S. 82-36' W. 1055 feet to station 862/96.4: thence with the arc of a 2 degree curve to the right 541.6 feet to station 868/38.0; thence No. 86-34' W. 971.6 feet to station 878/09.6; thence with the arc of a 4 degree curve to the right 496.2 feet to station 883/05.8; thence N. 66-41' W. 116.1 feet to station 884/21.9; thence with the arc of a 4 degree curve to the left 640.1 feet to station 890/62.0., which point is the intersection of the center line of the Asphalt Belt R. R. with the east line of Carroll survey No. 536, said intersection being north along said east line 1842.5 feet from the southeast corner of said survey.

All bearings used in this description vary from the magnetic bearings ten degrees and twenty-five minutes.

Containing 44.82 acres.

Fourth: That a survey has been made for said line of railroad and said above described property is a portion of said survey and said land above described is necessary for the construction of said railroad, and plaintiff desires to condemn the same for the purpose of constructing

thereon its railway line and tracks, depots, station building, machine shops, repair shops, side tracks, switches, turn-tables, tool houses, reservoirs, for water supply, water tanks and for additional facilities of every kind and character and for other lawful purposes necessary and incident to the building, operating and maintaining of its said railroad and carrying out the purposes of its said corporation.

Fifth: That the said Asphalt Belt Railway Company and said owners, defendants herein, cannot agree upon the damages and said Railway Company is unable to agree with the owners for the purchase of said real estate above described.

WHEREFORE, plaintiff prays this Honorable Court to appoint three disinterested free holders of said Uvalde County, Texas, as special commissioners to assess said damages and that said commissioners proceed as provided by law to assess such damages; that said above described land be condemned for railroad purposes above set forth; that your petitioner be allowed to pay the just and true value thereof, and that an easement for right of way and other railroad purposes above set forth over the above described land be divested out of the defendants and vested in the plaintiff and for such other and further relief, general and special, to which it may be entitled.

MASON WILLIAMS
Attorney for Plaintiff.

STATE OF TEXAS
COUNTY OF UVALDE

I, J. W. Graham, Clerk of the County Court for Uvalde County, Texas, do hereby certify that the above and fore-

going is a true and correct copy of Original Petition for Condemnation, Asphalt Belt Railway Company vs. J. B. Smyth and W. A. Smith, as appears on file in this office, and is number 1243, on the Docket of the County Court of Uvalde County, Texas. and was filed July 6th, 1923. Witness my hand and the seal of the County Court of Uvalde County, Texas, this the 12th day of July, A. D. 1923.

(Signed) J. W. GRAHAM
County Clerk Uvalde County, Texas.
By MARY MILLER, Deputy.

COPY

ENDORSED: In Equity No. 267. J. B. Smyth, et al vs Asphalt Belt Railway Company, et al. Bill of Complaint Filed July 23, 1923. D. H. Hart, Clerk. by J. F. Caroline Deputy

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## ANSWER OF SAN ANTONIO UVALDE & GULF RAILROAD COMPANY.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.

J. B. Smyth, et al,

vs.

Asphalt Belt Railway Company, et al.

No. 267 In Equity.

Now comes the San Antonio, Uvalde & Gulf Railroad Company, and, answering the Bill of Complaint filed herein on the 23rd day of July, 1923, denies all and singular the allegations in said bill contained, except as hereinafter

specially admitted, and of this it puts itself upon the Country.

Specially answering herein, said defendant respectfully would show unto the Court:

*First:* This defendant admits that it is a railroad corporation, organized and existing under the laws of the State of Texas, with its principal office in San Antonio, Bexar County, Texas, and that it owns a line of railroad substantially as alleged in the first part of sub-division 4 of the Bill of Complaint; but in this connection this defendant would show that it and all of its properties and assets of every kind and character are in the hands of a Receiver appointed by this Court, in Cause No. 194 In Equity, entitled John Tlapek vs San Antonio, Uvalde & Gulf Railroad Company.

That a Receiver was appointed in said suit on the 14th day of August, 1914, and that all of its properties, assets and revenues are still in the hands of a Receiver, and that the Railroad Company cannot and does not function as a railroad or a common carrier; that it has no money or property or assets of any kind or character in its possession, and no control over any property, money or assets. That it had and has nothing to do with the Asphalt Belt Railway Company; that it took no part in having said Asphalt Belt Railway Company chartered; that it furnished no money or assets of any kind, or anything of value to said Asphalt Belt Railway Company, or to its incorporators, or its servants, agents or employes. That it supplied no funds and no property to said Asphalt Belt Railway Company or its incorporators; that it paid none of the capital stock of said Asphalt Belt Railway Company;

and that said last named railway company is not controlled or dominated in any respect by this defendant, and is not its subservient creature, and that said Asphalt Belt Railway Company is not a subsidiary corporation to this defendant, and that this defendant had and has nothing to do with the organization, operation or existence or said Asphalt Belt Railway Company; and, in the very nature of things, this defendant could not have anything to do with the organization, creation and existence of said Asphalt Belt Railway Company, because it has control of no property or money with which it could give such aid or take part in such organization.

*Second:* Replying to the fifth sub-division of said Bill, this defendant says that it has not undertaken to construct, maintain and operate said Asphalt Belt Railway Company, and that if said Asphalt Belt Railway constructs its line, the same will not be an extension of the existing line of this defendant. That this defendant cannot at the present time operate its own lines, and certainly cannot operate the line of any other railroad, as its power to function as a railroad and as a common carrier was taken away from it by the receivership proceeding, as hereinbefore set forth.

*Third*: That this defendant had and has nothing to do with the condemnation proceedings described in the Bill; that it had and has nothing to do with any of the acts and things alleged in said Bill of Complaint; that it is not functioning as a common carrier of freight and passengers in interstate and foreign commerce, or in any other commerce; and that it is and will continue dormant as long as the receivership is continued in this case.

In so far as applicable to it, the San Antonio, Uvalde & Gulf Railroad Company adopts the answer of A. R. Ponder, Receiver, and the Asphalt Belt Railway Company, and it prays that it be dismissed with its costs.

Respectfully submitted,

G. W. WHARTON
R. J. BOYLE
MASON WILLIAMS
Attorneys for San Antonio, Uvalde and Gulf Railroad Company.

ENDORSED: No. 267 In Equity J. B. Smyth, et al, vs Asphalt Belt Railway Company et al. Answer of San Antonio Uvalde & Gulf Railroad Company. In District Court of the United States, Western District of Texas, San Antonio Division Filed July 28, 1923. D. H. Hart. Clerk. by J. F. Caroline, Deputy.

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## ANSWER OF A. R. PONDER, RECEIVER SAN ANTONIO UVALDE AND GULF RAILROAD COMPANY

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.
J. B. Smyth, et al,
vs.
Asphalt Belt Railway Company, et al.
No. 267 In Equity.

Now comes A. R. Ponder, Receiver of the San Antonio, Uvalde & Gulf Railroad Company, and, answering the Bill

of Complaint filed herein on the 23rd day of July, 1923, denies all and singular the allegations in said Bill contained, and of this he prays the judgment of the Court.

Specially answering herein, said A. R. Ponder, Receiver, respectfully would show:

*First*: That in this Court, in cause No. 194 In Equity, styled John Tlapek vs San Antonio, Uvalde & Gulf Railroad Company, this defendant was appointed Receiver, and, under the order of this Court, took charge of all of the assets of every kind and character belonging to the San Antonio, Uvalde & Gulf Railroad Company, and as such he and his predecessor Receiver have operated said railroad and administered its properties and affairs, and that since the appointment of the Receiver,—to-wit, on the 14th of August, 1914,—the San Antonio, Uvalde & Gulf Railroad Company has had no authority or control of its line of railroad, or any of its assets or funds.

*Second*: The said A. R. Ponder, Receiver, further would show unto the Court that he had and has nothing whatever to do with the Asphalt Belt Railway Company; that he, as Receiver, did not participate in its organization; that he, as Receiver, has no management or control over said Asphalt Belt Railway Company; that he, as Receiver did not cause or inspire its organization, and as such Receiver he does not dominate it in any way, and as such Receiver he had or has nothing whatever to do with said Asphalt Belt Railway Company. That as such Receiver he does not intend to operate said proposed road of said Asphalt Belt Railway Company as a part of the San Antonio, Uvalde & Gulf Railroad Company, and that in the nature of things he could not do so.

*Third*: That this Receiver, appointed by this Court, is under the absolute contol and orders of this Court; that all of his acts except the ordinary operation of the existing line of the San Antonio, Uvalde & Gulf Railroad Company—are invalid and of no force and effect unless authorized by this Court; that he has never applied to this Court for any authority to assist in the organization of the Asphalt Belt Railway Company, and that no orders have been issued authorizing him to engage in such activities, and that any acts done by him, if any—which is not admitted but expressly denied—in the organization, operation and control of the Asphalt Belt Railway Company, would be and are absolutely void and of no force and effect.

*Fourth*: That in truth and in fact the line of railroad owned by the San Antonio, Uvalde & Gulf Railroad Company is operated by this Court through the intervention of A. R. Ponder, Receiver of this Court, and that in truth and in fact the allegation that A. R. Ponder, Receiver of the San Antonio, Uvalde & Gulf Railroad Company, is engaged in the organization of another subsidiary railroad company to be owned and operated by the Receiver of this Court is nothing more nor less than alleging that this Court is indulging in such alleged unlawful activities.

*Fifth*: Your Receiver further alleges that as Receiver he has and had nothing whatever to do with the Asphalt Belt Railway Company; that he has made no contract with reference thereto; that he is not obligated to operate said railroad,—if the same is constructed,—and that he will not so obligate himself unless he is authorized to do so by the order of this Court. That he has operated the line of the

San Antonio, Uvalde & Gulf Railroad Company strictly under the orders and direction of this Court; that he has not exceeded his authority, and that he will not do so.

Said A. R. Ponder, Receiver, hereby adopts, in so far as applicable to him, the answer of his co-defendants, and prays that he be dismissed with his costs.

Respectfully submitted,

G. W. WHARTON

R. J. BOYLE

MASON WILLIAMS

Attorneys for A. R. Ponder, Receiver San Antonio, Uvalde & Gulf Railroad Company.

ENDORSED: No. 267 In Equity J. B. Smyth, et al vs Asphalt Belt Railway Company et al. Answer of A. R. Ponder, Receiver San Antonio Uvalde and Gulf Railroad Company In U. S. District Court, Western District of Texas, San Antonio Division Filed July 28, 1923. D. H. Hart, Clerk. by J. F. Caroline, Deputy.

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## ANSWER OF ASPHALT BELT RAILWAY COMPANY.

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.

J. B. Smyth, et al,

vs.

Asphalt Belt Railway Company, et al.

No..... In Equity.

Now comes the Asphalt Belt Railway Company, and, answering the Bill of Complaint filed herein on the 23rd

day of July 1923, denies all and singular the allegations in said Bill contained—except such as are hereinafter specially admitted,—and of this it puts itself upon the country.

And for special answer herein, the Asphalt Belt Railway Company respectfully would show:

*First*: That a charter was issued to this defendant by the State of Texas on June 9, 1923, for the purpose of constructing a line of steam railroad from a connection with the San Antonio, Uvalde & Gulf Railroad, in Zavala County, Texas, in a northwesterly direction into Uvalde County, Texas, and to a point near the asphalt mines of the Texas Rock Asphalt Company, in said Uvalde County, Texas; and that said proposed railroad, when and if constructed, will be less than twenty (20) miles in length, and will lie wholly within the State of Texas, and at no point will it touch or come within many miles of any border of the State of Texas.

*Second*: That its stock was regularly subscribed for by individuals and not by any corporation of any Receiver of any corporation.

*Third*: That it was organized for the purpose of doing purely an intra-state business, and that it has no intention of doing any other character of business.

That there are large deposits of rock asphalt for several miles along the northwestern portion of said proposed line of railroad, and an exceedingly large amount of rock asphalt at its northwestern terminus at the mines or quarries of the Texas Rock Asphalt Company, and that said deposits of rock asphalt, both along the line and at the quarries of the Texas Rock Asphalt Company, give promise of an exceedingly large and lucrative tonnage that would be handled

by this defendant if it be permitted to construct its proposed line.

*Fourth*: This defendant respectfully would show that it is not a subsidiary to either or both of its co-defendants, and that neither of its co-defendants supplied any funds or property for the payment of its capital stock, but that such funds were paid in by private capital, and that this defendant is not controlled or dominated by any one other than its stockholders and board of directors.

*Fifth*: Defendant further would show that it is not in truth and in fact an extension of the existing line of the San Antonio, Uvalde & Gulf Railroad Company, and that all acts done by it towards the condemnation of property of plaintiffs for right-of-way have been done by this defendant through its duly constituted officers, and by no one else.

*Sixth*: This defendant admits that it has not applied to the Interstate Commerce Commission to secure from said Commission a Certificate of Public Convenience and Necessity, for the reason that it was advised by counsel that such a certificate was unnecessary; that defendant was organized and came into existence long after the passage of the Transportation Act, 1920, referred to in said Bill of Complaint; and that at the date of the passage of said Act it did not own, operate or control any railroad, and, in fact, was not in existence, and it was organized for the purpose of doing an intra-state business, and not an inter-state business; and the terms and conditions of said Transportation Act, 1920, requiring from the Interstate Commerce Commission a Certificate of Convenience and Necessity, did not and does not apply to this defendant.

This defendant further was advised by counsel that if

the terms of said Transportation Act, 1920, requiring from the Interstate Commerce Commission a Certificate of Convenience and Necessity does apply to this defendant, and to other railroad corporations of like character and organized for the same purpose, then said Act, in this respect, is contrary to the Constitution of the United States, and is void.

*Seventh*: This defendant alleges that its organization was and is not a subterfuge, and that its proposed line of railroad will not be an extension of the line of the San Antonio, Uvalde & Gulf Railroad Company, and that its organization, construction and operation without a Certificate of Convenience and Necessity from the Interstate Commerce Commission will not abridge any rights, duties and privileges lawfully conferred upon said Interstate Commerce Commission.

On the other hand, this defendant avers that it was organized and created for the sole purpose of doing an intra-state business; that its losses of operation, if any, will not be a burden upon any road engaged in inter-state or foreign commerce; that it is no part of any system of any railroad that is engaged in inter-state or foreign commerce; and that the attempted control by the complainants of the construction and operation of this road, through this injunction, is an unlawful and unwarranted abridgement of the powers of the State of Texas.

This defendant further would show that if this injunction be made permanent it will absolutely destroy the powers of the State of Texas to issue charters and grant franchises to any railroad of any character to be operated wholly within the territory and the jurisdiction of the State of

Texas; and that, in so far as said Transportation Act, 1920, attempts to destroy the right of the State of Texas, or any other state, to issue a charter and grant a franchise to a railroad to be operated wholly within its territory, the same is contrary to the Constitution of the United States, is an abridgement of the reserved powers of the State, and is wholly void.

*Eighth*: That the Bill of Complaint filed herein is wholly without equity, in this:

That the rock asphalt deposits along the northwestern end of the road proposed to be constructed by this defendant, and the deposits of rock asphalt at the northwest terminus of this proposed railroad, at the quarries which are now owned and operated by the Texas Rock Asphalt Company, are of great value; that said rock asphalt is being used for paving purposes by many cities and municipal corporations in the State of Texas, and is being used by the various counties in this state in constructing a vast system of highways in said state, and said counties are assisted by moneys appropriated by the State of Texas and the United States Government. That said deposit of rock asphalt is the most valuable topping for streets and high-ways to be found anywhere within the State of Texas, and the funds appropriated by the United States government for the construction of a system of high-ways in the State of Texas, and the funds of the State of Texas, appropriated to match the funds appropriated by the United States government, constantly are being used to buy this rock asphalt and complete and construct said high-ways.

That there are only two mines of any consequence now quarrying said rock asphalt to be sold to cities and towns,

municipal governments, the State of Texas, and the United States to complete the construction of the streets and high-ways of this State. One of said quarries or mines is owned by the Texas Rock Asphalt Company, and the other is owned and operated by the complainants herein.

The mines or quarries of the Texas Rock Asphalt Company, to which this line of railroad is proposed to be extended, have no outlet to any railroad transportation, and mined products must be hauled by trucks to a railroad, there to be distributed to the various streets, roads and high-ways being constructed by various counties, aided by the State of Texas, and the United States, within said State of Texas.

That it costs approximately $1.50 per ton to haul, by trucks, the quarried product of the Texas Rock Asphalt Company to the nearest railroad, so that the same can be placed on the market in competition with the quarried product of the complainants herein.

That the complainants have a spur, or switch, or industrial track from their mines to the station of Cline, on the Southern Pacific line of railroad, and their quarried products are hauled on said spur or industrial track from their mines to the station of Cline on the Southern Pacific line of railroad in the State of Texas.

That the Texas Rock Asphalt Company, and all other mines that might hereafter be opened in competition with the mines of the complainants herein, is placed at a great disadvantage, because they have no railroad facilities, and this injunction is sought and this proceeding is instituted by the complainants herein for the sole and only purpose of restraining or preventing competition in the sale of

rock asphalt to be used by said counties, aided by the United States government, by the State of Texas, and also used by municipal corporations located within the borders of said State of Texas.

That the complainants herein have no interest whatever in this litigation other than to prevent, restrain or suppress competition; that the suppression or restraint of competition is their sole and only aim in instituting this litigation; that they are not interested in the advancement or the lowering of freight rates, but their interest is purely selfish.

That J. B. Smyth, one of the complainants herein, has repeatedly asserted, before this litigation was instituted, that he did not propose to allow the Texas Rock Asphalt Company, or any other concern, to get to the markets on the same advantageous terms and conditions of the complainants, and that he did not propose to permit the Texas Rock Asphalt Company, or any other competitor, to compete with him on the same basis and under the same terms and conditions which he was marketing said rock asphalt. Therefore, this defendant avers that the complainants herein, by this litigation, are seeking and trying by every means within their power to establish a monopoly and to place themselves in a position where they can sell to the United States government, to the State of Texas, to the counties, and to the various municipal corporations located within the State of Texas rock asphalt for paving purposes at prices far in excess of its natural and ordinary value, and far in excess of what the public would have to pay for said rock asphalt if competition were not suppressed.

*Ninth*: This defendant is informed and believes, and

here avers that complainant, J. B. Smyth, speaking for himself and other complainants, offered to donate a right-of-way to this defendant in order to construct its line of railroad, provided it would stop at the mines of the complainant and go no further, and provided also that the Texas Rock Asphalt Company would not be supplied with railroad transportation but would be compelled to haul to the railroad its mined products in trucks; and, further, that said Texas Rock Asphalt Company—practically the only competitor of complainants—would pay the complainants a substantial royalty on every ton of rock asphalt which they carried from their own mines, and which they own, and in which said complainants have no interest whatsoever.

*Tenth*: This defendant further would show that the land which it seeks to condemn is not worth anything like the amount alleged by the complainants in said original bill, but, on the other hand, this defendant alleges that said land sought to be condemned is not worth over $15.00 per acre, and that the same is rendered for taxation by the complainants herein at the sum of $3.00 per acre.

*Eleventh*: This defendant would show that it has no interest whatsoever in the Texas Rock Asphalt Company, or any other asphalt company now existing or which may hereafter be started on its proposed line of railroad; that it intends to build a railroad purely for railroad purposes to haul rock asphalt in intra-state shipments. That none of the directors of this defendant or stockholders is interested in any way whatsoever in any lands, mines or quarries now located or which may hereafter be located along its lines, but that it is organized purely for the purpose of

fulfilling its public duties of supplying to the United States government, the State of Texas, and municipal corporations located therein rock asphalt for paving purposes.

WHEREFORE, having fully answered herein, and having shown the want of equity of the Bill of Complaint, this defendant prays that it go hence without day and recover its costs.

G. W. WHARTON
R. J. BOYLE
MASON WILLIAMS
Attorneys for Asphalt Belt Railway Company.

ENDORSED: No. 267 In Equity J. B. Smyth, et al vs Asphalt Belt Railway Company, et al. Answer of Asphalt Belt Railway Company. In U. S. District Court, Western District of Texas San Antonio Division Filed July 28, 1923. D. H. Hart. Clerk. by J. F. Caroline, Deputy.

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## FIRST AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS,
AT SAN ANTONIO.

J. B. Smyth, et al.,

-vs-

Asphalt Belt Railway Co., et al.

In Equity No. 267.

TO THE HONORABLE DUVAL WEST, JUDGE OF SAID COURT:

COME NOW the Complainants in the above styled and numbered cause and files this their amended Bill of Complaint herein and for such amendment they say:

1.

If Complainants should be mistaken with respect to the matters alleged upon information and belief in Paragraph 4 of their original Bill of Complaint herein, then, in the alternative, they allege upon information and belief that subsequent to the appointment and qualification of the Defendant Ponder, as Receiver of the properties and assets of the Defendant, San Antonio, Uvalde & Gulf Railroad Company, and prior to the incorporation of the Defendant, Asphalt Belt Railway Company, substantially all of the outstanding securities of said Railway Company, stocks and bonds, were acquired by Frank Kell, Esq., of Wichita County, Texas, W. T. Eldridge, Esq., of Fort Bend County, Texas, and the said A. R. Ponder, and said individuals have ever since held and owned such securities and now hold and own the same and control and dominate the policies relating to the operation and management of the railroad of the Defendant San Antonio, Uvalde & Gulf Railroad Company; that they have worked out a plan of reorganization affecting said line of railroad, by which said line of railroad and its appurtenances will be acquired by another railroad company created for that purpose; that in pursuance of said general plan the said Kell, Eldridge and Ponder also caused the incorporation of Defendant Asphalt Belt Railway Company and own or have agreed to own the securities thereof, as issued, in the same proportions that they respectively own the outstanding securities of the Defendant San Antonio, Uvalde & Gulf Railroad Company and that it has been and is their intention and purpose to cause the construction, maintenance and operation of the line of railroad of the Defendant Asphalt Belt Railway Company to be

accomplished and conducted as a mere branch, division or extension of the existing railroad now operated by Defendant Ponder, Receiver, and to cause the Defendant Asphalt Belt Railway Company to be and remain a mere subsidiary of the corporation which has been projected as the future owner of the existing properties of the Defendant San Antonio, Uvalde & Gulf Railroad Company, with the stock and other securities of such subsidiary to be held and owned either directly by the parent corporation or by trustees for the use and benefit of the parent corporation and the stockholders thereof. Further, that the intention and purpose of the Defendants and of the said Kell, Eldridge and Ponder is that said existing railroad and said proposed railroad shall be owned by substantially the same parties, operated under a common management and control and for a common purpose and in the advancement of a common interest.

2.

Complainants further allege upon information and belief that the condemnation proceeding referred to in Paragraph 5 of their original Bill of Complaint herein was instituted by the Defendant Asphalt Belt Railway Company and unless restrained will be pressed and prosecuted by it in pursuance of the plan and in aid of the purposes above referred to; that the same constitutes a substantial part of the undertaking to construct the line of road proposed to be constructed by the Defendant Asphalt Belt Railway Company and is in violation of Paragraph 18 of Section 1 of the Interstate Commerce Act by reason of the facts alleged herein and in said original Bill of Complaint.

Wherefore, the Complainants pray as in their original Bill of Complaint set forth.

FRANK ANDREWS
ROBERT H. KELLEY,
Solicitors for Complainants.

STATE OF TEXAS )
COUNTY OF BEXAR )

BEFORE ME, the undersigned authority, on this day personally appeared J. B. Smyth, known to me to be a credible person, who being by me duly sworn deposes and says upon his oath that he has read over the above and foregoing amended Bill of Complaint; that he is one of the Complainants referred to therein and makes this affidavit for himself and for his co-Complainants being thereunto duly authorized; that the matters and facts therein set forth are within his knowledge true, except such as are therein stated upon information and belief, and them he verily believes to be true.

J. B. SMYTH.

Sworn to and subscribed before me this the 30th day of July, A. D., 1923.

W. L. RUSSELL
(Seal) Notary Public, Bexar County, Texas.

ENDORSED: In Equity No. 267 J. B. Smyth, et al., -vs- Asphalt Belt Railway Co., et al. 1st Amended Bill of Complaint. Filed July 30, 1923. D. H. Hart, Clerk. By J. F. Caroline Deputy

## MOTION TO DISMISS BILLS.

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.

J. B. Smyth, et al,

vs.

Asphalt Belt Railway Company, et al.

No. .... In Equity.

Now come the defendants, and move the Court to dismiss the bill filed herein on the 23rd day of July, 1923, and the supplemental or amended bill filed on the 30th day of July, 1923, and for grounds of such motion respectfully would show unto the Court:

*First:* That the bill and the amendment show no equity.

*Second:* That said bill and the amendment thereto show that A. R. Ponder is the Receiver of the San Antonio, Uvalde & Gulf Railroad Company, appointed by this Court, and that he has no right as Receiver to engage in any of the activities in which he is alleged to have engaged, and that such activities, if undertaken by the said Ponder, would be void and of no force and effect.

*Third:* Said bill and the amendment thereto show that the San Antonio, Uvalde & Gulf Railroad Company is in the hands of a Receiver appointed by this Court, and that it has no assets, finances or property of any kind of character at its disposal, and that it cannot function as an interstate or common carrier, and cannot engage in the undertakings alleged in said bill and the amendment thereto.

*Fourth:* The bill of complaint and the amendment thereto show that the complainants are not such parties in

interest as is contemplated by the Transportation Act, 1920, and, therefore, they cannot maintain this suit.

*Fifth:* The original bill of complaint and the amendment thereto show that the defendant, Asphalt Belt Railway Company, was organized long after the Transportation Act, 1920, was enacted, and that it is an intra-state carrier and is not subject to the terms and conditions of said Transportation Act.

Defendants pray that the separate answers of the three defendants be considered in connection with this motion, and that said original bill of complaint and the amendment thereto be dismissed for the reasons set forth in this motion and in the separate answers of the three defendants; and for all costs.

Respectfully submitted,

G. W. WHARTON

R. J. BOYLE

MASON WILLIAMS

Attorneys for defendants.

ENDORSED: No. 267 In Equity J. B. Smyth, et al vs Asphalt Belt Railway Co. Motion to Dismiss Bills. In the District Court of the United States, Western District of Texas, San Antonio Division Filed July 30, 1923. D. H. Hart. Clerk, By J. F. Caroline Deputy

## FIRST SUPPLEMENTAL ANSWER.

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION.

J. B. Smyth, et al,

vs.

Asphalt Belt Railway Company, et al.

No. 267 In Equity.

Now come the defendants, and, leave of the Court being had and obtained, file this their first supplemental answer, and, replying to the amendment to the bill this day filed by the complainants, respectfully would show:

*First:* That Frank Kell and W. T. Eldridge each owns forty-eight (48) per cent of the stock of the Asphalt Belt Railway Company, and that A. R. Ponder owns four (4) per cent, except as such percentage was reduced by the distribution of qualifying shares to the Directors.

*Second:* That in the San Antonio, Uvalde & Gulf Railroad Company Frank Kell owns one share of stock, W. T. Eldridge one share, and A. R. Ponder one share. That the said Kell, Eldridge and Ponder have made a contract to purchase the stock and bonds of the San Antonio, Uvalde & Gulf Railroad Company, said stock and bonds being now owned by the Executors of the Estate of John T. Milliken, deceased. Under said contract, the said Kell, Eldridge and Ponder have until June 1, 1927, in which to pay for said stock and bonds. At the present time, however, said stock and bonds are owned by the Executors of the Estate of John T. Milliken, deceased, and they are in absolute control of the corporation, and elect the Board of Directors; and the

contract of purchase of the stock and bonds provides that the Milliken Estate shall remain in entire control of the corporation until the entire purchase price for said stock and bonds has been paid.

Respectfully submitted,

G. W. WHARTON

R. J. BOYLE

MASON WILLIAMS

Attorneys for defendants.

ENDORSED: No. 267 In Equity J. B. Smyth, Et Al, vs Asphalt Belt Ry. Co. El Al. First Supplemental Answer. In U. S. District Court, Western District of Texas, San Antonio Division. Filed July 30, 1923 D. H. Hart. Clerk. By J. F. Caroline Deputy

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## DECREE.

IN THE DISTRICT COURT OF THE UNITED STATES

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION.

J. B. Smyth, et al,

vs.

Asphalt Belt Railway Company, et al.

No. 267 In Equity.

Came on to be heard the above styled and entitled cause upon the original and supplemental complaints of the complainants, J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, and the motion to dismiss as well as the original and supplemental answers of the defendants, Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf

Railroad Company, and A. R. Ponder, Receiver of the properties and assets of said San Antonio, Uvalde & Gulf Railroad Company; and the Court having heard the pleadings of the parties, the evidence introduced, and the argument of counsel, is of the opinion that this Court is without jurisdiction in this cause.

It is therefore ordered, adjudged and decreed:

*First:* That said application for injunction be and is hereby denied, and the temporary restraining order heretofore issued in this cause is hereby dissolved.

*Second:* That, subject to the right of complainant to further amend their Bill of Complaint, within ten days from this date, if they be so advised, leave thereto being hereby granted, said Bill of Complaint as now amended shall be and the same is hereby dismissed.

*Third:* That no part of this order shall be held to prejudice the right of complainants to make a further application for a temporary injunction on such further amendment, if any, as they may file within the time aforesaid, or to raise and assert in the condemnation proceeding, mentioned in said Bill, any of the questions raised herein or to defend such proceeding on any ground mentioned in said Bill as amended. To all of which complainants excepted and gave notice of appeal.

Done at San Antonio, Texas, in open court, this 30th day of July, 1923.

DuVAL WEST
Judge.

Entered Vol 2 page 154

ENDORSED: No. 267 In Equity In District Court of the U. S. Western District of Texas, San Antonio Division. J. B. Smyth, et al vs Asphalt Belt Ry. Co. et al Decree. Filed July 30, 1923, D. H. Hart, Clerk. By J F. Caroline Deputy

## SECOND AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AT SAN ANTONIO.

J. B. Smyth, et al.

-vs-

Asphalt Belt Railway Co., et al.

In Equity No. 267.

NOW COME the Complainants in the above styled and numbered cause and leave of court being first had file this their Second Amendment to the Bill of Complaint herein and for such amendment they say:

1.

That the line of railroad proposed to be constructed by the Defendant Asphalt Belt Railway Company, as alleged in the original bill of complaint herein, is to be constructed under and in accordance with the terms of a certain contract in writing made and entered into under date of the second day of June, A. D., 1923, by and between Frank Kell of Wichita County, Texas, and W. T. Eldridge of Fort Bend County, Texas, therein called Contractors, and Texas Rock Asphalt Company, a corporation, therein called Asphalt Company. That by the terms of said agreement, which has been transferred by the said Contractors to the Defendant Asphalt Belt Railway Company, the Contractors bound and obligated themselves to construct or cause to be constructed a line of railroad from a point on the rails of San Antonio, Uvalde & Gulf Railroad Company, near the station of Pulliam, Zavalla County, Texas, to a point within

eight miles of the mine of said Texas Rock Asphalt Company. That said contract further provided that the Contractors would acquire the right of way for the remaining eight miles of said railroad, to-wit, from said point to the mines of said Asphalt Company, but with the approval and at the cost and expense of said Asphalt Company, and that after said right of way had been acquired, whether by purchase or condemnation, the Contractors should furnish to said Asphalt Company a written estimate of the cost of constructing said remaining eight miles of railroad. That within a fixed time after receiving such estimate said Asphalt Company should elect either to construct said remaining eight miles of railroad itself or to have the same constructed by the Contractors, in which latter event the amount of such estimate should be deposited in a bank in the City of San Antonio, Bexar County, Texas, subject to withdrawal by the Contractors, to pay for such construction, and in that connection such agreement further provided that the amount of such estimate should be the maximum cost of such construction to said Asphalt Company, the Contractors to pay the excess above the same, if any, but that if such construction should cost less than the amount so deposited the difference should be refunded to said Asphalt Company.

That said agreement further provided that the title to said eight miles of railroad, which includes that portion of said railroad proposed to be constructed over the lands of these Complainants, should be vested in said Asphalt Company, but that the Contractors and their assigns, including the Defendant Asphalt Belt Railway Company, should have the right to use the same and the obligation

to maintain, manage and operate said eight miles of railroad. Said agreement also provided that the Contractors and their assigns should refund to said Asphalt Company the cost of constructing said eight miles of railroad, including the cost of the right of way therefor without interest, by paying to said Asphalt Company the sum of Ten Dollars ($10.00) per car on certain traffic to be moved over said line of railroad as in said contract more specifically set forth, and that the ownership of said line of railroad, as between the Contractors and their assigns on the one hand and the said Asphalt Company on the other hand, should at all times be determined by proportionate amounts paid by them respectively for the construction of such line of railroad, that is to say, that the interests of the said Contractors and their assigns, including the Defendant Asphalt Belt Railway Company, in said eight miles of railroad should be that proportion of the entire title to said piece of railroad as the amount at such time paid to said Asphalt Company by such refunds on traffic moved thereover should bear to the entire cost of constructing said piece of railroad and that the taxes thereon should from time to time be paid in the same proportions.

2.

These Complainants would further show that under and by virtue of the terms of such written agreement, copy of which marked "Exhibit A" is hereto attached and hereby referred to and made a part hereof for all purposes, the title to said eight miles of railroad including the title to the right of way sought to be condemned from these Complainants J. B. Smyth and W. A. Smith, as alleged in their

original bill of Complaint, will, upon the completion of said eight miles of railroad, be vested entirely in the said Texas Rock Asphalt Company, a private corporation, that the said Asphalt Belt Railway Company, as the assignee of the contractors named in said agreement, will have a mere right to use said eight miles of railroad and the right of way so sought to be condemned but not the exclusive right to use the same; that the said Texas Rock Asphalt Company, a private corporation, as the owner of the title to said eight miles of railroad and the right of way therefor, will also have the right to use said eight miles of railroad and the right of way therefor; that the Defendant Asphalt Belt Railway Company has no right under said contract to pay the entire cost of constructing such eight miles of railroad and thereby to acquire the full title thereto, except in the event that the traffic moving thereover shall suffice to produce refunds, as provided in said agreement, sufficient to reimburse said Asphalt Company for the full cost of constructing said eight miles of railroad. Your Complainants would also show that the institution of said condemnation proceeding now pending in Uvalde County, Texas, in the name of the Defendant Asphalt Belt Railway Company as plaintiff, is a mere sham and a subterfuge; that the real party in interest as plaintiff in said cause is said private corporation Texas Rock Asphalt Company, which under the laws of the State of Texas has no power of eminent domain and no authority of law to institute or maintain any condemnation proceeding whatever.

That thereby the condemnation proceeding referred to in the original Bill of Complaint on file herein is wholly without authority of law to support the same, for that the

same constitutes an effort to condemn and expropriate the property of the Defendants therein for a private use in violation of Section 19 of Article 1 of the Constitution of the State of Texas, by which it is provided that no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land, and also in violation of Section 17 of Article 1 of the Constitution of the State of Texas, which prohibits the taking of private property except for public use; and the prosecution of said condemnation proceeding is also in violation of the Fourteenth Amendment to the Constitution of the United States, because, in contravention of the terms of said amendment, the same will, unless restrained, constitute the deprivation of these Complainants by the State of Texas of their private property without due process of law and will deny to these Complainants the equal protection of the laws in that no other property owners of this State are subjected by the laws of this State to the condemnation of their property for private purposes.

That the prosecution of said condemnation proceeding, being wholly without warrant or authority of law and being in violation as aforesaid of the Constitution of the State of Texas and of the United States, amounts to a continuing trespass upon the right, lands and properties of these Complainants which, unless restrained, will cause them to suffer irreparable damage and injury as fully set forth in their original Bill of Complaint herein and these Complainants are therefore entitled to have the same restrained and enjoined by writ of prohibitory injunction issued out and under the seal of this Honorable Court.

3.

These Complainants would further show by way of supplement to their original Bill of Complaint herein that since the hearing of their motion for preliminary injunction on the 30th day of July, 1923, the Commissioners appointed in said condemnation cause have held a hearing and have entered their award of condemnation to which these Complainants J. B. Smyth and W. A. Smith have duly filed exceptions as provided by the laws of the State of Texas, and that under such laws said proceeding is now pending in the County Court of Uvalde County, Texas, and will, unless restrained, be set down for trial at the ensuing term of said Court, which commences on, to-wit, the 17th day of September, 1923.

4.

These Complainants would further show in answer to the allegations of the Defendants herein to the effect that it is the intention of the Defendant Asphalt Belt Railway Company to confine itself to the carriage, movement and handling of intra-state traffic moving wholly within the State of Texas; that said Defendant may not under the laws of the State of Texas and particularly under Articles 6588, 6608 and 6610 of the Revised Statutes of Texas of 1911, so limit or confine the operation of said line of railroad or the obligations of said railroad company to the public. That under the laws of the State of Texas every railroad company created under such laws is obliged upon demand to transport, carry and handle inter-state commerce as defined in the Interstate Commerce Act. Upon information and belief these Complainants allege that as soon

as said railroad is completed, if at all, demand will be made upon it from time to time for movement by it of inter-state and foreign commerce and that such commerce will be moved, transported and handled by said Defendant over its said line of railroad.

WHEREFORE, these Complainants pray as set forth in their original Bill of Complaint on file herein.

FRANK ANDREWS.
ROBERT H. KELLEY.
Solicitors for Complainants.

STATE OF TEXAS )
COUNTY OF BEXAR )

BEFORE ME, the undersigned authority, on this day personally appeared J. B. SMYTH, known to me to be a credible person, who being by me duly sworn deposes and says upon his oath that he has read over the above and foregoing amended Bill of Complaint; that he is one of the Complainants referred to therein and makes this affidavit for himself and for his co-Complainants being thereunto duly authorized; that the matters and facts therein set forth are within his knowledge true, except such as are therein stated upon information and belief, and them he verily believes to be true.

J. B. SMYTH.

Sworn to and subscribed before me this the 7 day of August, 1923.

(Seal)

R. L. HOGAN
Notary Public, Bexar County, Texas.

(COPY)

EXHIBIT 1

THE STATE OF TEXAS
COUNTY OF BEXAR

THIS CONTRACT entered into between Frank Kell, of Wichita County, Texas, and W. T. Eldredge, of Fort Bend County, Texas, hereinafter called the Contractors, and the Texas Rock Asphalt Company, a Delaware corporation, having a permit to do business in Texas, with its principal Texas office in San Antonio, Texas, hereinafter called the Asphalt Company,

WITNESSETH:

(1)

The Contractors hereby agree to do and perform the following things:

(a) To construct, or have constructed, a standard gauge railroad from a point about one (1) mile south of Pulliam, Texas, a station of the San Antonio, Uvalde & Gulf Railroad in Uvalde County, to a point within eight (8) miles of the rock asphalt mine of the Asphalt Company in Uvalde County, Texas, on Section 536, Uvalde County, Texas; said road to be constructed as near as practical along the line the Contractors have already surveyed, as shown by blueprint hereto attached, marked in red, and made a part hereof.

(b) To begin construction of said line within thirty (30) days after the right of way thereof is made available either by purchase or condemnation, and to complete said construction within ninety (90) days from the date of the commencement thereof.

(c) To purchase or condemn a fifty (50) foot right of way from a point where the line of the Contractors ends to the rock asphalt quarry owned by the Rock Asphalt Company, located on Section 536, Uvalde County, Texas.

Provided, however, that said right of way shall be paid for by the Asphalt Company; and provided further that if the right of way be acquired by purchase the price shall be subject to the approval of the Asphalt Company; and if it has to be acquired by condemnation the Asphalt Company shall pay the price awarded by the Court, plus the Court costs, provided the price is acceptable to both parties hereto.

Provided further that if the award of the commissioners be either finally raised or lowered on appeal the amount of the final award shall be adjusted accordingly, so that the Asphalt Company will pay only the amount of the final award, including court costs, and the Contractors or their assigns shall pay to the Asphalt Company only such final award, plus court costs.

The Contractors will have their attorneys condemn the land, and the Asphalt Company shall not be required to pay any attorneys' fees except that the Asphalt Company may have their attorneys assist in all condemnation, but the Contractors shall not be liable for any fees to the attorneys of the Asphalt Company.

(d) When said right of way is available for the extension of said line hereinabove provided to be built by the Contractors from the said point within eight (8) miles of said Rock Asphalt mine, as shown by the blueprint hereto attached, the said contractors shall at once furnish the Asphalt Company with an estimate of the costs of the con-

struction of said extension, and the said Asphalt Company shall within ten (10) days after such estimate is furnished either elect to construct said eight (8) mile extension or request the Contractors to construct same, and in the event the Asphalt Company elects to construct same it shall commence construction within twenty (20) days thereafter and complete the same within ninety (90) days; on the other hand, if the Asphalt Company so elects, it may request the Contractors within said ten (10) days to construct said eight (8) mile extension and, if so, shall at the time it requests the Contractors to construct same, deposit in a San Antonio bank the amount of said estimated cost with authority to Contractors to pay out said funds for such construction work as they previously estimated, approved by the Contractors' engineer, and the Contractors agree and bind themselves in such event to pay the costs of such construction, if any, in excess of said estimated amount so deposited in the bank, and should the cost of said construction be less than said estimated amount, the difference between the actual and the estimated cost so deposited in the bank shall be returned to the Asphalt Company.

It is especially understood and agreed between the parties, however, that the Contractors shall not be required to commence construction of the part of said railway lines described in subdivision (a) of this paragraph until right of way for the entire line to the Asphalt Company's mine is available and that the construction of that part of the line, and the part described in subdivision (c) after the right of way is available shall be proceeded with as expe-

ditiously as possible whether such part of line is built by the Contractors or the Asphalt Company.

(e) When the entire line is completed, as provided for hereinbefore and hereinafter, the Contractors or their assigns will take charge of said entire line and maintain and operate the same, free of cost to the Asphalt Company, and construct all sidings or other tracks necessary for their operation at their expense.

(f) To pay to the Asphalt Company the entire cost of construction of said eight (8) miles hereinafter provided for, in the following manner, that is to say: The Contractors or their assigns will pay to the Asphalt Company the sum of ten dollars ($10.00) per car for each and every carload of freight moved in or out over said line, consigned to or from the Asphalt Company, destined to or from the quarry of the Asphalt Company. This shall continue until the entire cost of said eight (8) miles has been paid.

There shall be no interest charged on the cost of the eight (8) miles of track hereinafter specified to be constructed by the Asphalt Company. Any other person, association or corporation that may desire to ship any commodity shall be allowed, subject to the approval of the Contractors, to connect their spurs or switches at any point along the line they may desire, and the Contractors or their assigns shall have the right to transport or haul the freight thus offered over any portion or all of said line.

(g) To secure an order from the Texas Railroad Commission which will equalize the freight rates from the quarry or quarries of the Asphalt Company to all points in Texas, with rates on the same class of material from the station of Cline on the Southern Pacific Lines to all points

in Texas; and the Asphalt Company shall not be required to commence construction of the eight (8) miles to its mine or deposit the estimated cost thereof to be expended by the Contractors for that purpose until such order is secured.

(2)

The Asphalt Company hereby agrees to do the following things:

(a) To construct a standard gauge railroad from its rock asphalt mines in Uvalde County, Texas, in an easterly direction, along the line which the Contractors have recently surveyed, and which is shown in the attached blueprint and marked in red, or as near as practical thereto, for a distance of eight (8) miles from the quarry of the Asphalt Company, and to connect with the line to be constructed by the Contractors, or request the Contractors to construct same as hereinabove provided.

(b) To pay for the right of way of fifty (50) feet wide used in the construction of said eight (8) miles of railroad; and in the event it is necessary to condemn the right of way or any part of it, to pay the award of the commissioners, plus all court costs, but not including attorneys' fees, except the fees of attorneys whom the Asphalt Company itself may employ in condemning said right of way, provided said cost of said right of way is approved by both parties.

(c) Should the Asphalt Company build and construct the eight (8) miles of line hereinabove described instead of having the same constructed by the Contractors as hereinbefore provided for, said line shall be constructed on the

line to be located by the engineer of the Contractors or their assigns and to construct said line under the supervision of and subject to the approval of the engineers of the Contractors in all its details, including all material used on said eight (8) miles of line; and in no event shall the Asphalt Company use less than fifty-six (56) pound rails, and such rails shall not be of a lower grade than No. One (1) Relayers, with suitable angle bars, spikes and ties; provided, however, that the Contractors will use in such construction any rail of not less than fifty-six (56) pounds and of no lower grade than number one (1) relayers, with suitable angle bars, spikes and ties as may be furnished them by the Asphalt Company.

There will be no charge made for the engineering services furnished by the Contractor and this engineering service shall include the location and staking out of the line.

(d) To construct and maintain, at its own cost and expense, and all spurs, side tracks, or yards that may be or may become necessary for its use in the operation of the quarry of the Asphalt Company now under operation, or which may hereafter be placed under operation, provided, however, that the Contractors or their assigns shall not be required to go upon any tracks constructed by the Asphalt Company in its quarry unless and until such tracks are made safe for operation in the opinion of the Contractors or their assigns or the designated representatives of either.

(e) To execute and deliver to the Contractors a good and sufficient bond in the sum of One Hundred Thousand Dollars ($100,000.), conditioned that when the right of way for said line to the quarry of the Asphalt Company is

made available by purchase or condemnation as herein provided, and the equalization rate order hereinbefore referred to obtained, the Asphalt Company will either deposit for the use of the Contractors in the construction of the eight (8) miles hereinabove described the estimated cost thereof as hereinabove provided or will build and construct said eight (8) miles to its quarry within ninety (90) days, or to pay the Contractors or their assigns such damages as may be sustained by reason of the failure of the Asphalt Company so to do.

(f) To convey to the Contractors, their successors or assigns, or to anyone designated by them, said eight (8) miles of railroad agreed herein to be constructed by the Asphalt Company, free of all claims and encumbrances, when the Contractors, their successors or assigns, have paid to the Asphalt Company the original cost, without interest, of said eight (8) miles of railroad. It must be understood, however, that the ownership of the Contractors, or their successors or assigns, of the said eight (8) miles of railroad herein agreed to be built by the Asphalt Company, will at all times be in the same proportion as the amount the Contractors, or their assigns, have paid to the Asphalt Company—as said amounts so paid bear to the total cost of construction of said eight (8) miles of railroad, and the Contractors or their assigns each year shall pay such proportion of the taxes; provided that if for any reason the operation of this road or spur by the Contractors or their assigns should be abandoned because the Asphalt Company and others who may connect therewith shall cease to make shipments thereon, after its completion, the Contractors or their assigns are to have the title to the

salvage in the same proportion as above indicated; provided further that the Asphalt Company at no time shall have any right, title or interest in and to that part of the line between the S. A. U. & G. road and a point eight (8) miles from the mine, herein agreed to be constructed by the Contractors or their assigns.

(g) The Asphalt Company agrees and guarantees that there will be a total of not less than One Hundred and forty-four thousand (144,000) tons of freight moved out over the line herein proposed to be built, during the first three (3) years after the said line is completed and put in operation, and for each ton short of this amount the Asphalt Company or its assigns shall pay to the Contractors or their assigns the sum of twenty-five cents (25c) per ton by crediting on the purchase price to be paid for said railroad by the Contractors to the Asphalt Company the amount so deficient, This amount of one hundred and forty-four thousand (144,000) tons shall include all of the asphalt moved out of said territory over this line whether originating at the quarry of the Asphalt Company or any other quarry, which is now owned or may hereafter be established on said line or contiguous thereto.

(h) As a part of the consideration of this contract, the Asphalt Company agrees to ship over this line the total output of the asphalt rock of its said quarry until the payment of ten dollars ($10.00) per car equals the total cost of the eight (8) miles of track to be constructed including the cost of the right of way for said eight (8) miles, and it is especially understood and agreed that the provision of subdivision (g) of this paragraph, for the crediting on the purchase price of the tonnage short on the guaranteed

tonnage for three (3) years at twenty-five cents (25c) per ton, shall not affect this obligation and that the Asphalt Company is obligated to ship all of its tonnage over said line until the number of cars shipped at ten dollars ($10.00) per car equals the cost of said eight (8) miles of track including right of way, notwithstanding a part of the purchase price may be credited as provided in subdivision (6)

(3)

It is distinctly agreed and understood between the parties hereto that the Contractors shall within thirty (30) days from date hereof do all things necessary to enable the Contractors to commence within said thirty (30) days the acquisition of said right of way for said proposed railroad by purchase or condemnation and will proceed as expeditiously as possible to acquire such right of way by purchase or condemnation and within thirty (30) days after said right of way is available will obtain said equalization rate order and commence construction of said railroad and prosecute the same to completion within ninety (90) days; provided the Asphalt Company has performed the conditions herein imposed upon it with reference to said railroad; provided further that should the construction of said railroad be delayed by legal proceedings the time of such delay shall not run against the Contractors. If the Contractors do not within thirty (30) days commence such proceedings for the acquisition of right of way or after the acquisition thereof and the compliance by the Asphalt Company with its obligations do not commence construction of said railroad within thirty (30) days thereafter and obtain the equalization rate order hereinabove referred to, this con-

tract shall be null and void and no longer binding on either party hereto.

WITNESS OUR HANDS in duplicate this 2nd day of June, A. D. 1923.

(Signed) Frank Kell
" W. T. Eldridge
The Contractors.
TEXAS ROCK ASPHALT COMPANY
By (Signed) O. C. Chapin
Vice President.

ATTEST
(Signed) R. J. Boyle, Secretary.

WITNESS: (Signed) A. R. Ponder.

ENDORSED: In Equity No. 267 J. B. Smyth, et al. -vs- Asphalt Belt Rwy. Co., et al. 2nd Amended and Supplemental Bill of Complaint. Lodged with the Clerk, Aug. 7/23 File as of date Aug 24, 1923 Filed Aug. 24, 1923 D. H. Hart, Clerk, By T. H. Thompson, Deputy.

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## MOTION OF DEFENDANTS TO DISMISS SECOND AMENDMENT TO BILL, ETC.

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION.
J. B. Smyth, et al,
vs
Asphalt Belt Railway Co. et al.
No. 267 In Equity.

Now come the defendants and move the Court not to permit the second amendment to the bill to be filed, and,

if filed, to dismiss the same, together with the bill and the first amendment thereto, and for grounds of such motion respectfully would show:

*First:* That this Court has no jurisdiction of the matters and things set up in said second amendment to the bill, nor over the matters and things set up in the bill and the first amendment thereto.

*Second:* The original bill, in connection with the two amendments thereto, show no equity.

*Third:* The bill and the amendments thereto show that the Asphalt Belt Railway Company is an intra-state railroad, and is not subject to the terms and conditions of the Transportation Act, 1920.

*Fourth:* The original bill, and the amendments thereto, in connection with a copy of the contract between Kell and Eldridge and the Texas Rock Asphalt Company—a copy of which is attached to the second amendment to the bill—show that the entire railroad, when constructed, will belong to the Asphalt Belt Railway Company, and that it is being constructed for a public purpose.

Respectfully submitted,

R. J. BOYLE

G. W. WHARTON

MASON WILLIAMS

Attorneys for defendants.

ENDORSED: No. 267 In Equity In U. S. District Court Western District of Texas San Antonio Division. J. B. Smyth, et al vs Asphalt Belt Ry. Co. et al Motion of Defendants to Dismiss Second Amendment to Bill, Etc. Filed Aug. 24, 1923. D. H. Hart, Clerk, By T. H. Thompson, Deputy.

## SECOND AMENDED ANSWER OF ASPHALT BELT RAILWAY CO.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION.

J. B. Smyth, et al.

vs

Asphalt Belt Railway Co. Et Al.

No. 267 In Equity.

To the Honorable Judge of said Court:

Now comes the Asphalt Belt Railway Company, one of the defendants in the above styled and numbered cause, and, leave of the Court being first had and obtained, files this its second amendment to its previous answers, and, specially answering the second amendment to the bill, respectfully would show unto the Court:

*First:* That, as shown by the bill and the two amendments thereto, condemnation proceedings were begun before the County Judge of Uvalde County, Texas, by this defendant, prior to the filing of the original bill in this court, and that, therefore, the jurisdiction of the state court had attached prior to the filing of the original bill in this court.

*Second:* That as shown by the second amendment to the bill, the condemnation proceeding was heard before the Commissioners, and the complainants herein had filed their objections to the award of the commissioners, and that the case, therefore, was pending in the County Court of Uvalde County, Texas, prior to the filing, or the tender for filing, of the second amendment to the bill. This Court, therefore,

has no jurisdiction in this matter, because the Judicial Code and the laws of the United States prohibit the Federal Court from enjoining or staying a proceeding pending in any state court.

This defendant denies that any part of its line, when constructed, will belong to the Texas Rock Asphalt Company, but alleges that the contract between Kell and Eldridge and the Texas Rock Asphalt Company, attached to the second amendment to the bill, shows that the Texas Rock Asphalt Company is contributing a bonus, in the shape of interest on the money required to build eight miles of said railroad, and in the shape of paying part of the taxes on said eight miles of railroad until this defendant repays to the Texas Rock Asphalt Company the amount of money it advances to aid in the construction of said eight miles of railroad. Said contract shows that the Texas Rock Asphalt Company in said contract is seeking only to retain a lien on the eight miles of said railroad, to the construction of which it contributes, in order to secure the payment of the amount of money it advances to construct said eight miles of railroad.

*Third:* This defendant denies that the Texas Rock Asphalt Company, a private corporation, will be the owner and will have the title to said eight miles of railroad, to the construction of which it contributes, and denies that the Texas Rock Asphalt Company will have the right to use said eight miles of railroad, but, on the other hand, the contract attached to the second amendment to the bill shows conclusively that the Texas Rock Asphalt Company will have no sort of management or control over said eight miles of railroad, to the construction of which it contrib-

utes, but that it is merely seeking to retain a lien on said part of said road to secure the amount of money it advances to aid in the construction thereof.

*Fourth:* This defendant further would show that since the condemnation proceeding before the commissioners in Uvalde County, Texas, this defendant has done a large amount of work in the construction of said railroad, having previously deposited double the amount awarded by the commissioners, and given bond as required by the Statutes of Texas, and that an injunction, staying the building of said railroad, and staying the proceedings in the County Court of Uvalde County, Texas, condemning right-of-way for said railroad, would be greatly embarrassing to this defendant, and it would be compelled to abandon its business of construction, disorganize its forces, cancel its orders for necessary materials, and this defendant would be greatly hampered and delayed, to its great damage.

*Fifth:* This defendant further would show that it expects and intends to do an intra-state business only, and that it will not have joint interstate tariffs, and that it will not join in any inter-state tariffs.

*Sixth*: That after the temporary injunction was dissolved in this Court, on the 30th day of July, 1923, this defendant, on the 31st day of July, 1923, tried its condemnation suit with the complainants herein, before the Commissioners appointed by the County Judge of Uvalde County, Texas, and the award was made by Special Commissioners, and, thereupon, double the amount awarded was deposited by this defendant, and it likewise gave the bond as required by the Texas Statutes, and has proceeded with the construction of said railroad, and has spent a large

amount of money in clearing the right-of-way and grading the same, and in buying ties and rails, and other materials necessary for the construction of said railroad, and the same is now under construction, and the work of said construction is proceeding with due diligence.

This defendant reiterates its answer and the amendment thereto heretofore filed, and it prays that the bill, and the first and second amendments thereto, be dismissed, and that it go hence without day and recover its costs.

Respectfully submitted,

R. J. BOYLE
G. W. WHARTON
MASON WILLIAMS
Attorneys for said defendant.

ENDORSED: No. 267 In Equity J. B. Smyth, et al vs Asphalt Belt Ry. Co., et al Second Amended Answer of Asphalt Belt Railway Co. In U. S. District Court, Western District of Texas San Antonio Division Filed 24th day of August 1923 D. H. Hart, Clerk, by T. H. Thompson, Deputy.

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## DECREE.

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION.

J. B. Smyth, et al.

vs

Asphalt Belt Railway Company, et al.

No. 267 In Equity.

Came on to be heard the application for injunction on complainants' original bill and the first and second amend-

ments thereto—leave having been granted to file said second amendment in the interlocutory order entered herein on the 30th day of July, 1923—and the Court having heard the pleadings, evidence and the argument of counsel is of opinion that the Court is without jurisdiction, and that the defendants' motion to dismiss the bill and the amendments should be and the same is hereby granted.

It is therefore ordered that said original bill and the two amendments thereto be and the same are hereby dismissed.

It is further ordered that the complainants pay all costs in this behalf incurred, for which all due process may issue.

To all of which the complainants in open court at the time duly excepted, and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

Done at San Antonio, Texas, in open court, this the 14th day of September, 1923.

DuVAL WEST

Judge.

Entered Vol 2 page 157

ENDORSED: No. 267 In Equity In U. S. District Court Western District of Texas, San Antonio Division. J. B. Smyth, et al. vs Asphalt Belt Railway Company et al. Decree. Filed 14 day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

## MEMORANDUM OPINION ON DEFENDANTS' MOTION TO DISMISS

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THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
J. B. Smyth, et al,
vs
Asphalt Belt Railroad Co., et al.

No. 267—In Equity

## MEMORANDUM OPINION ON DEFENDANTS' MOTION TO DISMISS

STATEMENT OF THE CASE: This is a suit by land owners to enjoin a railroad company from condemning their property as a right-of-way until it shall have first obtained the certificate of public convenience and necessity required by Paragraph 20 of Section 1, of the Transportation Act of February 28th, 1920. Jurisdiction rests solely upon the ground that the suit is one arising under the Commerce Clause of the Constitution and Acts of Congress regulating Interstate Commerce.

Paragraphs 18 and 20 of Section 1 of the Transportation Act, are as follows:

(18) "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until

there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

(20) "Any construction * * * contrary to the provisions of * * * Paragraph 18 of this Section may be enjoined by any Court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party at interest * * * ."

The defendant, Asphalt Belt Railroad Company, hereinafter for brevity called the A. B. Company, was regularly incorporated June 9th, 1923, under the general incorporation acts of this State, Chapter 1, Title 115, of the Revised Statutes of Texas, for the purpose of constructing, owning, maintaining, and operating a line of railroad from a point on the line of the San Antonio, Uvalde & Gulf Railway Company, hereinafter for brevity called the S. A. U. & G. Company, near the station of Pulliam in Zavalla County, thence Northwesterly into Uvalde County to a point at or near the mines of the Texas Rock Asphalt Company, about twenty miles from the beginning point; said line to lie wholly within the State of Texas; the corporation to have all the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including power to con-

struct and extend. That thereafter the A. B. Company, being unable to agree with the plaintiffs, land owners, as to compensation for the use of its right-of-way over their properties, instituted condemnation proceedings under the laws of the State of Texas.

Plaintiffs claim that the A. B. Company is a carrier by railroad who is subject to the provisions of the Transportation Act, it being obliged by law, and its object and purpose being, to carry on its business as interstate carrier. And they further claim to be such parties at interest under the provisions of Paragraph 20 of the Transportation Act, supra., as entitle them to enjoin the A. B. Company from proceeding further unless and until it shall have obtained the certificate of public convenience and necessity provided for in Paragraph 18 of the Transportation Act, Supra. The plaintiffs further allege that this certificate is necessary upon the ground that the A. B. Company is owned and controlled through stock ownership by the stocknolders, directors, and officers and employes of its co-defendant the S. A. U. & G. Company, an interstate carrier, and that consequently the proposed new line is in reality an extension of the S. A. U. & G. Railroad, and the same certificate would be required. The plaintiffs pray for injunction.

Upon the filing of the suit a temporary restraining order was issued.

The defendant A. B. Company denied all material allegations, and declared that its sole purpose was to engage in intra-state commerce, and expressly denied that it was in any particular an extension or a part of the S. A. U. & G. Company. It affirmatively declared that it was not controlled by that company, and had and exercised a dis-

tinct entity of its own, wholly apart from, and in no manner controlled by, its co-defendant interstate carrier. That it is not a carrier subject to the terms of the Transportation Act; that the Court is without jurisdiction; and that the suit should be dismissed.

Upon hearing July 30th, 1923, the suit was dismissed for lack of jurisdiction, and the restraining order dissolved. Plaintiffs were allowed to amend and a further hearing and re-submission of the whole matter was had on August 24th, the defendants again standing on their motion to dismiss. Being a rehearing, the former judgment of dismissal of July 30th should be, and the same is hereby, superseded and set aside.

THE QUESTION OF JURISDICTION: The A. B. Company because of its incorporation under the general laws of the State of Texas applying to railroads has the right to construct, maintain and operate a railroad wholly within the State of Texas. Obviously it has the right under such laws to condemn private property for public use as an intra-state common carrier, whether it intended to, or afterwards engaged in interstate commerce or not. The right to stay proceedings of this sort should therefore be made to clearly appear beyond any reasonable doubt.

Since the plaintiffs' right to injunction rests upon provisions of an Act of Congress regulating interstate commerce, the Court would be without jurisdiction unless the facts show: (1) That the Asphalt Belt Railroad Company is owned and controlled by the San Antonio, Uvalde & Gulf Railroad Company, an interstate carrier, thus constituting it an extension and branch of the latter road, or (2) that

the A. B. Company is obliged by law, and its purpose is, to carry on business as an interstate carrier.

CONSIDERING THE FIRST GROUND: The Court finds that the majority of the stockholders of the A. B. Company constitute either a majority of the stockholders of the S. A. U. &. G. Company, or are persons who hold options on all outstanding bonds of the S. A. U. &. G. Company, and on a majority of its stock. That most of the officers and directors of the A. B. Company are officers and directors, or employes, of the S. A. U. &. G. Company. That the latter company's properties are now held, and for some years past have been held, and are operated through a receivership under orders of this Court. The Court concludes as a matter of law that this character of stock ownership and indirect control by stockholders of different railroad corporations does not constitute them "a single corporation", nor destroy the corporate entity of either. (Georgia S. & F. Ry. Co. vs Georgia Public Service Com'n., 289 Fed., 878; Pullman Palace Car Co., vs Mo. Pac. R. R., 115 U. S., 587, 596-597; Rose's Notes on U. S. Reports, Vol. 13, p. 114, annotations; Conley vs. Mathisson Alkali Works, 190 U. S., 406).

The A. B. Company's proposed construction not being an extension or branch of the interstate carrier, the S. A. U. &. G. Company, the certificate of public convenience and necessity is not required from the Interstate Commerce Commission by that Company. Jurisdiction cannot therefore be maintained on the first ground.

THE SECOND AND REMAINING BASIS for jurisdiction is plaintiff's insistence that the A. B. Company is

obliged by law, and its purpose is, to conduct business both as an intra-state and inter-state carrier.

What obligations are imposed by law on the A. B. Company, and does it intend to carry interstate commerce? Its certified articles of incorporation give no hint of grant of power or purpose to engage in interstate commerce, but the significant fact of its physical connection with the S. A. U. &. G. Company, an interstate carrier, is kept in mind. Plaintiffs rely upon certain articles of the Statutes of the State of Texas as showing that the A. B. Company is compelled to receive and transport freight and passengers moving in both intra-state and interstate traffic.

Summarized, Article 6588 requires railroads to carry mails of the United States, fixing terms and prices for carriage of United States mail. This is an ancient statute passed many years before the Interstate Commerce Act was passed. Such an Act is necessarily in conflict with the provision of the National laws regulating the transportation of United States mails, and has no application to any issue before the Court and will be passed without comment.

Article 6608 provides as follows:

"TO RECEIVE FREIGHTS AND PASSENGERS FROM CONNECTING lines:—All railway companies doing business in this State shall be and they are hereby required to receive from all other railway companies with which they may connect at the state line of this State, or at any place within this state, or at any or all places where they may cross the line of any other railway doing business, or operating a line of railway, in this state, all freights and passengers coming to it from such connecting

line and destined to points on its line, or to points beyond its line or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received, and upon the same terms and conditions with those made by such line for like or similar service against any other railway in or out of this state with which it does business; * * * ."

Article 6609 defines what are connecting lines.

Article 6610 provides the terms and conditions as to division of the charges for carrying or transporting freights and passengers upon a mileage, or other, basis, and upon the same terms and conditions as to bills of lading, tickets, coupon-tickets, baggage checks, etc., that other corporations or lines may receive from other persons or corporations engaged in like business.

Article 6611 extends the provisions and requirements of the preceding articles to freights and passengers received from water craft common carriers.

It is to be noted that Articles 6608 and 6609 were enacted in the year 1887, the same year as the enactment of the Interstate Commerce Act. Article 6610 was passed in 1883 prior to the passage of the Interstate Commerce Act. Article 6611 was passed in 1899. It seems unnecessary to go into any extended and detailed statement showing in what particulars these Acts are now in direct conflict with the provisions of the many Interstate Commerce Acts that are now in effect. All of the articles mentioned specify terms

and conditions under which railroads in Texas shall interchange its business, the Statutes requiring Texas carriers to receive freights and passengers destined to points on its line, or connecting line, indirectly affects the terms and conditions upon which such movement may be handled in Interstate Commerce; and to that extent the Acts would be in conflict with the National Laws. The defendants refer to several articles of the Interstate Commerce Acts which would be in conflict with the provisions of the laws prescribed by the State, notably Sections 405, 416, 418, and 419 of the Interstate Commerce Act as amended February 28th, 1920, Supra.

Article 6612 of the Texas Statutes provides a penalty for refusing to interchange business with water craft as provided in Article 6611, the penalty being not less than Five Hundred Dollars nor more than Five Thousand Dollars, and shall forfeit to the damaged party One Thousand Dollars as penal damages for each and every act of violation of the law.

Article 6615 provides for penalties to be imposed for failing or refusing to receive from connecting lines, as required by Section 6608, the penalty being a forfeit of One Thousand Dollars as penal damages for each act of violation in addition to a right of action by way of general damages that may have accrued.

To give effect to those articles would be to declare that railroads in Texas, connecting with another railroad or common carrier by water, are compelled to engage in the transportation of Interstate Commerce, and consequently subject to the provisions of the Interstate Commerce Acts of Congress, and in this case fix the jurisdiction in this

Court. Has the State the power to do this? The power granted by the Constitution of the United States to the Congress to regulate Interstate Commerce is exclusive and becomes so when Congress exerts its paramount authority. The State's power to regulate ceases when in conflict with the Acts of Congress. (Sec. 8, Art. 1, Constitution of U. S.; and Art. 6, U. S. Constitution; Gibbons vs Ogden, 9 Wheat., p. 1; Mondou vs N. Y. N. H. & H. R. R., 223 U. S., 1; Minnesota Rate Cases, 230 U. S., 352; H. E. &. W. T. Ry. Co., vs U. S., 234 U. S., 342; Wisconsin vs C B & Q R R, 257 U S 563)

From what has been said it would appear plain that these old statutes of the State of Texas imposing heavy penalties for violations are clearly in conflict with those regulations that have been made by Congress and the Interstate Commerce Commission since the passage of the Texas Articles, and since the enactment of the Interstate Commerce Laws. Therefore, in giving effect to the articles of incorporation and the laws appertaining thereto, the A. B. Company, by operation of law, is intending to engage only in that character of commerce permitted by the laws under which it is incorporated, which necessarily would be confined to that commerce carried on within the limits of the State.

In Southern Railway Company vs Reid, 222 U. S. Page 425, a law of North Carolina required railroads to receive freight for transportation whenever tendered and to forward the same by the railroad selected by the person so tendering the freight, and providing for a penalty, for refusal, of Fifty Dollars per day. In that case there was a tender and a refusal of the freight to be carried from a

point in North Carolina to a point in West Virginia. No through or joint rates having been established and no rates having been filed with the Interstate Commerce Commission the shipment was refused. After several days delay, and after rates had been established, the shipment was finally accepted. Suit was brought for the several days penalties that had accrued. The Supreme Court of North Carolina held that the Statutes simply regulated a duty which preceded the entry of the goods in interstate commerce, and that the statute was neither an interference with nor a burden upon interstate commerce,—the same contention as is made by the plaintiffs in this case. The Supreme Court of North Carolina also decided that the execution of the duty imposed by statute was not precluded by the provisions of the Interstate Commerce Act requiring that tariffs be filed and schedules established, but that it was the duty of the Railway Company to file such schedules, and that the Company could not justify a violation of its common law duty by neglecting a statutory duty. It is needless to set out at any length the opinion of the United States Supreme Court in the Reid case. Nearly every line of it has direct application to the principles of law and facts that bear upon the case at Bar. It is sufficient to say that in that case the Court holds that a statute of a state requiring common carriers to transport freight as soon as received to interstate points under penalty for failure conflicts with the requirements of Section 2 of the Hepburn Act of July 29th, 1906, prohibiting transportation until rates had been fixed and published, and is therefore unenforceable. Undoubtedly the same conflict would appear under the like conditions which exist in the present case.

The Court therefore holds upon authority of the Southern Railway against Reid case, Supra., that the Texas Statutes in question are ineffective and void insofar as they touch interstate commerce.

As to the intention of the A. B. Company to engage in interstate commerce: The Company's witnesses testified that its intention was to engage solely in intrastate commerce. Since the duty of interstate carriage was not imposed by law as contended by the plaintiffs, the duty itself determines the intent, and since the Articles of Incorporation limit activities of the A. B. Company to intrastate commerce, so will its intention be limited.

The Court therefore holds that the Second and remaining grounds for jurisdiction that the Company was obliged by law, and its purpose was, to conduct business as an interstate carrier cannot be maintained, and jurisdiction so asserted fails.

Jurisdiction is primarily asserted because of the provisions of the Transportation Act of 1920. If the Court's jurisdiction in this case is not settled by the principles declared in the Reid case, the question is set at rest by a later case. The Supreme Court of the United States in State of Texas vs Eastern Texas Railroad Company et al, 258 U. S., 204,—interpreting paragraphs 18 and 20 of the Transportation Act, is authority for the proposition that a railroad, incorporated under the Texas laws, situated wholly within the State, may maintain its status as an intrastate carrier wholly independent of its duty as an interstate carrier. In that case it appears that the Interstate Commerce Commission issued its Certificate of Public Con-

venience and Necessity under paragraphs 18 and 20 authorizing the Eastern Texas Railroad Company to permanently abandon the operation of its railroad, both State and Interstate. The Company was incorporated under the general laws of Texas, owned thirty miles of railroad wholly within the State, and connected with an Interstate Carrier. The State sought to enjoin the abandonment because of the unconstitutionality of the Transportation Act insofar as abandonment as to intrastate commerce be in disregard of its obligations to the State. The Court holds that the Act did not authorize Congress to sanction the entire abandonment of railroads such as this. On Page 216 the Court says "The road lies entirely within a single State, it is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce can not be of other than local concern". The remarks of the Court so aptly cover the law and facts in this case that it seems pertinent to draw attention thereto. Quoting the syllabus the Court holds that "Paragraphs 18-20 of Sec. 1 of the Act to Regulate Commerce, added by Sec. 402 of the Transportation Act of 1920, which regulate the construction and acquisition of new lines of railroad and the extension and abandonment of old lines, are not to be construed as clothing the Interstate Commerce Commission with authority over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce will not be affected by that business." This case, therefore, is ample and conclusive authority for the proposition that under the facts of the case at Bar, and under the law

applicable thereto, the A. B. Company is not a carrier subject to the provisions of the Interstate Commerce Act in question, consequently the Court has no jurisdiction to entertain the relief by way of injunction which is sought by the plaintiffs.

Defendants' motion to dismiss plaintiffs' second amended bill filed August 24th, 1923, should be, and the same is hereby, sustained and the suit dismissed; the court intending that this order shall operate as a final decree, and to that extent supersede the judgment of dismissal entered herein on July 30th, 1923. An order to this effect will be entered in due course.

Done at San Antonio, Texas, this September 14th, 1923.

DuVAL WEST

U. S. District Judge.

ENDORSED: No. 267-In Equity J. B. Smyth, et al, vs Asphalt Belt Railroad Co., et al. U. S. District Court Western District of Texas San Antonio Division Memorandum Opinion on Defendants' Motion to Dismiss Filed 14th day of Sept., 1923 D. H. Hart, Clerk By T. H. Thompson Deputy.

## STATEMENT OF EVIDENCE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AT SAN ANTONIO.

J. B. Smyth, et al.

vs.

Asphalt Belt Railway Company, et al.

In Equity No. 267.

STATEMENT OF THE EVIDENCE.

On the hearing of the above numbered and entitled cause, held at San Antonio, Texas, July 30th, 1923, on Complainants' application for a preliminary injunction, and on the motions of the Defendants to dismiss the bill of Complainants, as amended, the following, and only the following, evidence was introduced, all of said evidence being re-offered and re-introduced at the hearing of said cause, held at San Antonio, Texas, on the 24th day of August, A. D. 1923, upon renewal of the application of Complainants for a preliminary injunction, to-wit:

### TESTIMONY OF A. R. PONDER.

A. R. PONDER, called by the Plaintiff, having been sworn testified as follows:

### DIRECT EXAMINATION

(By Robert H. Kelley)

My name is A. R. Ponder. I am the President of the San Antonio, Uvalde & Gulf Railroad Company, and am the Receiver of the properties and assets of that Company, acting under orders of this Court. I was appointed Receiver about the first of the year 1917, and I have been op-

erating the line of the San Antonio, Uvalde & Gulf, as its Receiver, since that time. The main line of that railroad runs from San Antonio to Corpus Christi, through North Pleasanton; at North Pleasanton it has a line which runs West and North to Uvalde, through Crystal City; and at Crystal City we have a branch line running South to Carrizo Springs; that, in a general way, is the way our railroad lies on the ground.

H. P. McMillan holds the office of Auditor under me as Receiver of the San Antonio, Uvalde & Gulf Railroad; and R. C. Tarbutton is my Chief Clerk and Purchasing Agent. R. H. Schultz is our Traffic Manager; and E. R. Breaker holds the position of Superintendent of Motive Power and Maintenance of way. F. L. Lewis holds the position under me of Superintendent; and R. C. Hollifield is our Agent at Uvalde. R. A. Yelton is employed in the Auditing Department,—Chief Clerk to the Auditor, under me as Receiver. R. E. Bovy holds the position under me as Receiver, of Clerk in the Auditor's office; and T. M. McCarthy holds the position of Stenographer and Clerk, under me as Receiver. Mason Williams is my General Attorney, as Receiver.

This railroad which is proposed to be built is proposed to start from a point on the rails of the San Antonio, Uvalde & Gulf Railroad near Pulliam, to go in a general Northwesterly direction out to some asphalt mines. Mr. Curtis, Assistant Engineer of the San Antonio, Uvalde & Gulf Railroad, and a man named Benson made a survey out there either in September or October, last year, to determine about the location of that line; I don't remember the date, about that time. I did not bear the expense of the man as Receiver of the San Antonio, Uvalde & Gulf Railroad; there

were three of us made that up—Mr. Kell, Mr. Eldridge and I.

I have had an interest for quite a while in the outstanding securities of the San Antonio, Uvalde & Gulf Railroad Company, and Mr. Kell and Mr. Eldridge have a contract for certain interests; they have a contract to buy those outstanding securities, and between me and Mr. Kell and Mr. Eldridge the contract contemplated that if carried out Mr. Kell will have forty-eight per cent, Mr. Eldridge forty-eight and I four per cent. I did not acquire my interest at exactly the same time they acquired theirs—not the same negotiations exactly; I have had that interest for quite a while. It is substantially correct that they came in later and bought an option on what I didn't have option on, all of the old holders that we could see. I was purchaser for the same amount I originally held; practically the same amount. I was one of the original holders of the securities, and in effect I will continue my place in the list of stockholders and bond holders practically as I originally had. My stock was put up with the others who agreed to sell to Kell and Eldridge, all put up together, but I bought back. The effect, in reality, was my buying back what I sold, the only difference being that mine is paid for and I have it, and theirs is not. They made a payment on the purchase price when the deal was consummated, and gave notes on which there has been no payments except the interest. Mr. Kell and Mr. Eldridge got this contract about the first of June, 1922,—just a little over a year ago. They have not devoted much attention to the management and operation of the property since that time; they have in a way. I presume Mr. Kell is interested in it, but he has not had

much to say in the management. As to whether he has conferred with me about the general policies of operating the property from time to time: well, we have had conferences, and he has written me letters about some matters, yes, sir. I get one or two letters a week from him sometimes; sometimes I didn't hear from him for two weeks. There were a good many other matters besides the operation of the railroad that we had the discussions over.

As to material having been concentracted at or near Pulliam to be used in the construction of this proposed line: well, there have been some rails unloaded there that belong to the Texas Rock Asphalt Company. That is all, I think; probably a few ties used to stack the rails on. They were shipped in there by the Texas Asphalt Company, and they paid the freight on it, and they were unloaded there. There is nothing there at the present time but some rails belonging to the Texas Asphalt Company; maybe a switch or two there, I think. There is enough rail concentrated there at the present time to lay a little over eight miles,—about eight miles, I would say.

There was a contract made between the Texas Rock Asphalt Company, Mr. Kell and Mr. Eldridge relating to the construction of this line of railroad and the financing of the cost of construction. The matter of constructing this railroad to reach the mines of the Texas Asphalt Company was first broached to me a couple of years ago. I didn't consider the matter much at first, because I couldn't do anything as Receiver or as an individual, but after I had done—after the other gentlemen became interested with me I laid the matter before them and they went into it again. I don't remember the date when a definite agreement was

first reached by which the Texas Rock Asphalt Company secured an agreement on the part of these gentlemen, or anybody else so far as I know, to build this railroad; it has been probably three months ago, maybe longer. A written contract was drawn up at that time relating to that matter, and the original contract is still in force so far as I know and has never been changed or amended that I know of. I am not sure whether a copy of that contract is in my office or not, but I believe there is, I imagine there is a copy there. I will make inquiry, and if I have got it I will produce it here in evidence. As to who the parties are to that contract: why, I read the contract, and my recollection is, I think it is correct, that the Texas Rock Asphalt Company, Mr. Frank Kell and W. T. Eldridge are the parties; I am not sure they are all parties. I am not a party to it in my individual capacity along with Mr. Kell and Mr. Eldridge; I expect to be interested in the railroad if it is built. At the time the contract was made it was not made for the benefit of Kell, Eldridge and myself, as the arrangement had not been completed that I would come in on this new line. No kind of a contract has been made, nor any tentative arrangement been reached between me, as Receiver of the San Antonio, Uvalde & Gulf Railroad and the Asphalt Belt Railway Company relating to divisions of revenues on traffic to move over those two lines. No arrangement had been made as to what the proportion of the through rates on any of this traffic would be, that is as to traffic proposed to be produced by the Asphalt Belt, what proportion would be kept by the Asphalt Belt or what proportion would be kept by me, as Receiver of the Sausage;

that matter had not been discussed; I have not discussed it with my Traffic Manager.

I hadn't thought of what basis of rates would be applied from the Northwestern terminus of the proposed line of railroad on this Rock Asphalt; we got an order from the Texas Commission to make the rates from Pulliam the same as they are from Cline to Texas points; that did not apply to this railroad. I applied to the Texas Commission to make rates to intrastate points in Texas from Pulliam the same as the Southern Pacific makes them from Cline. I don't remember at all discussing with my Traffic Manager the question of whether this additional line of railroad, if built, will charge that Pulliam rate, or whether it will add a differential over that; nor have I discussed that with any of the officers of the Texas Rock Asphalt Company either. As to whether it is my idea that the differential will be charged over the Pulliam rate, or that the Pulliam rate will be charged and the cost of the haul from the mines down to Pulliam will be absorbed by the other carriers: my idea is there will be a charge for the service from the mines to Pulliam.

Yes, sir, the Directors of the Asphalt Belt Company have elected officers for that Company. They have elected H. P. McMillan President. I don't remember about their electing any Vice-Presidents; I believe they have, but I am not sure. I have not been elected to any office under the Asphalt Belt schedule. So far as I know there has not been any one selected as Auditor of the Asphalt Belt Railway. They have a Secretary, who I believe is Mr. Tarbutton—I wouldn't be positive about that; and as to wheth-

er they have not opened any set of books up to this time, I think he does that part of it.

The offices of the Asphalt Belt Railway Company are in the Woolworth Building. It is a fact that the Asphalt Belt Railway has no office except the offices I occupy as Receiver of the San Antonio, Uvalde & Gulf Railroad.

Each of the incorporators of the Asphalt Belt Railway Company have subscribed for some of the stock; but Mr. Kell, Mr. Eldridge and I have subscribed for a majority of it. Each of the incorporators have the stock and it is in their names, and so far as I know they own the stock and paid the money individually. The money was not furnished them by Mr. Kell or Mr. Eldridge or myself for the shares they hold; I paid my part, but did not furnish money for the individual shares they hold. No, sir, I did not pay my part of the whole. The money for the capital stock of the Asphalt Belt Railway Company was paid in cash. I suppose the Secretary has the record of that, showing how much each man paid. I do not remember the number of dollars that I paid; we, Eldridge and Kell and I, have paid all except the seven shares. It is substantially correct that I paid four per cent of $19,300.00; it is not exactly in that proportion; we paid for 193 shares. My proportion was not exactly four per cent in this. Yes, in this my proportion is substantially the same as it is in the securities of the San Antonio, Uvalde & Gulf Railway; and the proportions of Mr. Kell and Mr. Eldridge in this are substantially the same as they are in the securities of the San Antonio, Uvalde & Gulf.

So far as I know there have not been any plans made looking to the operation of the Asphalt Belt Railway Com-

pany or its line of railroad, nor have any been made looking to the acquisition of the power or equipment for use of that road. No, it is not a fact that it has been my intention, and the intention of my associates that that power and equipment would be furnished to that line under lease or some other kind of contract by me as Receiver of the San Antonio, Uvalde & Gulf Railroad; there has been no arrangement made about that; it has not been discussed, not to any extent; I don't remember there being anything said about that at all. I discussed with Mr. Kell or Mr. Eldridge the matter of building this line, and among other things discussed what it would cost, which was an important part of our discussion. The cost of power and equipment was also discussed in connection with the cost of the road—talked about how much power and how many cars we would need. We reached a conclusion that we would have to have a certain number of engines and a certain number of cars. I couldn't say that provision has been made for money with which to buy that power and equipment; I don't think it has; we have been getting prices on cars, and locomotives too.

It is not a fact that I have thought the San Antonio, Uvalde & Gulf, if it would get the long haul on this traffic, could well afford to furnish what cars were needed for loading on this line; we haven't any cars of our own, not for that business; we have no surplus at all of cars that would be required for this movement. No definite arrangement or contract has been made for purchasing power or equipment; there has been considerable data gotten together on prices of cars and locomotives. The matter of purchasing power or equipment for this line has been dis-

cussed in my correspondence with Mr. Kell; he sent me some prices on cars occasionally. With respect to how those cars would be bought, or how the money would be raised,—we talked about the plan of buying them on the car trust plan, so much down and so much thereafter. When cars are bought on the car trust plan, you have to put up a substantial part of the purchase price, about twenty-five per cent. In my opinion as a railroad man, about one hundred cars would be required, in view of my present estimate of the expected traffic, to take care of that situation. It depends how much a piece they would cost; we have been offered some very good forty ton rebuilt second hand cars at seven, or eight or nine hundred dollars a piece; new cars cost more, running up probably fourteen hundred dollars.

I have no official position at all with the Asphalt Belt Railroad Company; I just have some stock is all. Yes, I should say I have been active in promoting the construction of that line. I was out on the ground frequently, participating in the surveying, locating the road. Yes, I would say it has been my judgment largely which has directed the location of that line of railroad. When this condemnation suit by the Asphalt Belt Railroad Company against J. B. Smyth and W. A. Smith was set for hearing before the Commissioners in Uvalde about two weeks ago, I was there. To tell you exactly how I got there: I went down to Crystal City and Carrizo Springs the day before, and then got an automobile and drove up to Uvalde the morning of the 17th; I got up there a little late. I had been down there making inspection on my own line for which I am the Receiver, and went from there to Uvalde to attend this condemnation proceeding; and during the evening before

this condemnation hearing was set, when a discussion was on between counsel on the two sides looking to a possible postponement of that proceeding, my counsel, Mr. Williams, got in touch with me over the telephone and discussed that matter with me. He asked me what I thought about the postponement, and I told him I didn't see any use in putting it off; he said he didn't either; he called me about it, yes, sir.

As to whether any reorganization plans have been worked out by the three of us, Mr. Kell, Mr. Eldridge and I, looking to the reorganization and termination of the receivership of the San Antonio, Uvalde & Gulf Railroad: the Court has been rather anxious that we get out of Court, and we have been trying to finance the thing so as to clean it up; not Kell and Eldridge, but the Milliken Estate which owns the stocks and bonds. It is a fact that Mr. Kell, Mr. Eldridge and I have been trying to work out some plan to put the San Antonio, Uvalde & Gulf on its feet so it can make its own living and terminate the receivership; we have been trying to improve the condition of it. If we hadn't thought we could do that, there would not have been any sense in those gentlemen spending money to get hold of those securities. In terminating this receivership for the San Antonio, Uvalde & Gulf, the thing is to get money to pay the debts. I don't think the Court looks to the matter of getting tonnage to provide the revenue; I think the Milliken people will clean the thing up pretty soon themselves.

Ever since in 1920 there have been no deficits; there have been surpluses, not allowing anything for interest on the bonds, however. I said some time ago that from the begin-

ning and taking the period of Government control, there had been annual deficits of $25,000.00 a year; since the termination of Federal control we have been able to go along and earn operating expenses, except in 1920; we had it ten months in 1920 and had a deficit during those ten months, the ten months immediately following Federal control; but in 1921 and 1922 we earned operating expenses, and have had a surplus ever since, in 1921 of about sixty thousand dollars, and in 1922 considerably less than that, probably twenty-five or thirty thousand dollars; we barely skinned by in 1922, we paid interest on certificates—Receiver's Certificates, during that time; we paid our taxes, everything except the interest on the bonds, but paid no dividends on stock, and no interest on outstanding bonds.

It is a fact that in order to make the San Antonio, Uvalde & Gulf profitable, we have got to have more business; and it is a fact that one of the things why Mr. Kell, Mr. Eldridge and I have looked with favor upon this proposition and the building of this additional line out to these rock asphalt mines is that we hoped to produce additional tonnage for the San Antonio, Uvalde & Gulf Railroad; we think the line will pay for itself and also help the San Antonio, Uvalde & Gulf. As to whether my interest in the San Antonio, Uvalde & Gulf has been a larger factor in inducing me to go forward with this proposition than any hope of the road earning extra profits, this Asphalt Belt: I have not thought of it that way; I thought of it as a whole. I considered the other ownership too, of the securities of the San Antonio, Uvalde & Gulf; it looked like a good thing for the three of us individually. We have been led to believe that we could get anywhere from twelve hun-

dred to two thousand, maybe three thousand, cars of rock asphalt per annum by the construction of this new line; and we believe it will be a good deal more in a little while; I look for a minimum of more than twelve hundred cars, I don't think it will be under twenty-five hundred, which would be about two hundred cars a month. I don't remember what the average revenues which would be derived from that traffic by the San Antonio, Uvalde & Gulf Railroad amounted to; it is quite an item. I have figured on that proposition some myself. If I had not made those figures I would not be able to exercise any judgment as to whether or not it would be a paying proposition. I wouldn't want to say what my estimates of the earnings, per car, are on that traffic for the San Antonio, Uvalde & Gulf; it is a matter of divisions with other lines, and I would want to check up on that; I wouldn't want to say off-hand; I have figured it out but I don't recall now what it was; I wouldn't want to say ABOUT what it was. It would be more than ten dollars a car; it would be something like fifty or sixty dollars per car, probably, based on the different routes; a minimum of five cents a hundred or $1.10 a ton, probably, to San Antonio. I can not recall all the details now. It was necessarily an estimate because I could not tell where the stuff would go and could not tell whether the divisions would be on a short haul or a long one; but on forty ton cars, my best recollection now is that it would probably be forty dollars per car; our division would be probably five cents per hundred pounds. Now on traffic that would stop along our line, it would be more than that; if it went to Houston or to Dallas, the division would then be only—I estimate it would run from forty dollars per

car up. But on this estimate of a couple of hundred cars per month, that figures that we would increase the gross earnings of the San Antonio, Uvalde & Gulf about ten thousand dollars a month, or something like that.

A part of the year the trains of the San Antonio, Uvalde & Gulf running South on the Western Division from Uvalde to North Pleasanton, run full tonnage; there is a good deal over half the time they don't. During most of the time the cars of rock asphalt coming over the Asphalt Belt Line into our regular trains would be a fill out, and could be moved very economically.

Q. So that the net revenues of the San Antonio, Uvalde & Gulf Railroad, for moving this traffic, would be a pretty high percentage of the gross, considering you have to operate these trains over your railroad anyway?

A. Well, considering the low rate it takes, * *

Q. Well, while it takes a low rate there are no claims, or substantially no claims on that business?

A. It is a good class of business. Yes, it is a very satisfactory business.

I do not remember of there being any discussion in which I took a part looking to the construction of this line from Pulliam out to the asphalt mines by any other method than that of incorporating a separate railroad for that purpose.

Q There was no other plan ever suggested?

A Well, when the plan first came up we thought if we could get the right-of-way out there we might build it out there, as an industry track.

Q An industry track connected with and to be operated by the San Antonio, Uvalde & Gulf Railroad Company?

A Probably so later on.

Q Was an effort made to procure right-of-way in order to lay the line along that plan?

A Well, I don't think there was much of an effort made until they incorporated the company.

Q Now, the San Antonio, Uvalde & Gulf's interests—by which I mean you and Mr. Kell and Mr. Eldridge—have plans on foot for the construction of other lines of railroad, have you not, Mr. Ponder?

A Well, we have a plan we would like to carry out. We now have pending before the Interstate Commerce Commission an application for a Certificate of Public Convenience and Necessity, to construct a line of railroad for a corporation known as the San Antonio & Mexican Railway, the proposed line of which Company would run between Three Rivers and Fowlerton, and from Fowlerton, down to either Mirando or Laredo. The line from Three Rivers to Fowlerton would approximately make a base for the triangle now made by the two divisions of our line with North Pleasanton as the apex. The effect of building this line would be that from Fowlerton to Three Rivers it would cut off about fifty miles as against going from Fowlerton to North Pleasanton, and then down to Three Rivers. In the course of the prosecution of this application for Certificate of Public Convenience and Necessity for the San Antonio & Mexican Railway, I signed a set of answers to questionaires that the Interstate Commerce Commission submitted to me, as Vice-President of the San Antonio & Mexican Railway Company. The stock of the San Antonio & Mexican Railway Company has not been subscribed by me, Mr. Kell and Mr. Eldridge substantially as I have

the stock of this Asphalt Belt Railroad; not the same proportion. I couldn't say how the stock of the San Antonio & Mexican has been subscribed, in what proportions, except I know Mr. Reese Allen, President of it, subscribed for the big end of the stock. It is a fact that in that questionaire the following question was asked and the following answer given:

"Q. If the proposed new line of railroad is an extension of an existing railroad, branch connecting track or cut-off, insofar as not fully set forth under paragraphs 15 and 16, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line?"

"A. While the proposed new line of railroad is to be constructed, owned and operated by a separately incorporated Company, yet the stockholders of such new railroad, applicant herein, are practically the same as and common with the owners of the SAU&G R. R., and the new line will be so allied with the SAU&G R. R. as that new line will greatly facilitate and add to the transportation business of the SAU&G R. R., and it is believed that the new line will accomplish this result to the extent that not only will the new line be a profitable one but so increase the business and earnings of the SAU&G R. R. as to greatly improve the financial situation of the SAU&G R. R. and put into a position where it will be financially strong and successful transportation company to such an extent that it will take care of the transportation requirements of the territory served by it. The importance of the construction of the proposed new line as it shall undoubtedly effect

favorably the business and the situation generally of the SAU&G R. R. is further emphasized in the fact that otherwise a great doubt exists as to whether or not the SAU&G R. R. will be able to continue as a transportation line or whether it must seek an abandonment of its properties."

And it is a fact that to a question in that list submitted respecting the character and value of traffic that would probably be interchanged, I made the following answer:

"The proposed new line connecting with the Western branch of the San Antonio, Uvalde & Gulf Railroad at or near Fowlerton and with the main line of the San Antonio, Uvalde & Gulf Railroad at or near Three Rivers, would constitute an intermediate line over which, with the completion of a deep sea waterway at Corpus Christi, now provided for and will be under construction shortly, a large line of tonnage would move, originating West of Fowlerton on the rails of the San Antonio, Uvalde & Gulf Railroad and other railroads of Texas destined to Corpus Christi for export, and would likewise be the intermediate line for a large line of tonnage coming through Corpus Christi from the Eastern seaboard destined to points in West Texas. We have reasons to believe that the tonnage so moved would amount to 5000 cars the first twelve months."

In that five thousand car estimate I made in answering the questionaire, consideration was given to this rock asphalt that we expected to produce by the building of this Asphalt Belt Railroad added to the stuff going to the Gulf Coast via our line that we might get at Uvalde any way on the Southern Pacific without the Asphalt Belt Railway; but we did figure that would add to our business, this line out from Pulliam.

Q. It is a fact too that the prospective tonnage from these asphalt mines would add greatly to the economics that would be accomplished by building this cut-off?

A. Well, the more business going through Fowlerton to Corpus Christi, the more important this cut-off.

Q. You would save fifty miles by going through instead of going around: But the point in my question was, isn't it a fact that you had this prospective rock asphalt tonnage in mind which made you and your associates deem it advisable to apply to the Commission for permission to build the cut-off?

A. Yes, sir, that increased our estimate, that prospective business we figured on.

I think it was stated in that questionaire that the applicant had a tentative agreement with the San Antonio, Uvalde & Gulf Railroad as to divisions on all business originating on or terminating on the new line, as well as all through business traversing the rails of the San Antonio, Uvalde & Gulf Railroad and the rails of the proposed new line. The way it come up that we would make a proposed divisional arrangement with the San Antonio & Mexican and not make one with the Asphalt Belt Railroad was this: one of the principal owners of the San Antonio, Uvalde & Gulf, Mr. Eldridge, was not in favor of going into that extension proposition, and we agreed with him that we would get the permit and build it and let the earnings divide on an operating basis; one of the principal owners of the Uvalde & Gulf was not disposed to engage in that extension. And in order to satisfy his view of the possible unprofitable nature of that construction, this divisional arrangement was made; that if he did not want to go in on

it he need not do so, and that when it was built it would be operated and the earnings divided on a mileage basis,—the earnings I mean; however, that is practically the ordinary way of dividing anyway.

Since the time of the original surveys which I referred to a while ago, we have paid the men out there for the cost of the surveys that have been made for this proposed line, out of the Receiver's funds and then billed on the other company, and were reimbursed for it all. The Engineer is regularly on the payroll of the San Antonio, Uvalde & Gulf's Receiver; the other men who have done the work were picked up out there; Mr. Benson was hired out there. They were employed and paid by me in the first instance, as Receiver of the San Antonio, Uvalde & Gulf, and I made bill against the Asphalt Belt, or individuals who were promoting it, for reimbursement; this applied to the two men, and the others picked up for that work. They were not paid directly out of the funds provided for the railroad; charged to them, the bills made up, and then I was paid by the Asphalt Belt, and the Asphalt Belt has reimbursed me, as Receiver, for everything. I couldn't say how much money approximately has been spent up to this time on these surveys; all I know about it is what has been paid in; I don't know what has been paid out. Twenty-five thousand dollars has been paid in; twenty thousand dollars was required to pay the capital in full, but there is a deposit of Twenty-five thousand dollars. I don't remember how much was paid out of that money; I can get it; probably one thousand or twelve hundred dollars was the cost of that surveying. Getting the charter, and things of that kind, with the first surveying and all would amount

to more than that; it would probably amount to more than twelve hundred dollars. But, anyway, it has all been paid by the people promoting the Asphalt Belt Railway Company, and the Receiver has got nothing against any of them now on the books. During the noon hour I will see if I can get a copy of that contract between the Texas Rock Asphalt Company and Kell and Eldridge. I can not absolutely agree to get for you either the minutes of the Directors' meetings of the Asphalt Belt showing the election of officers, or take from it a list of the officers elected by the Directors; I am not an officer, but I don't think I will have any difficulty in getting it.

(Upon question by the Court to Mr. Kelley if he was asking for anything Mr. Ponder had not already testified to, Mr. Kelley stated that he did not know exactly what officers had been elected, and that was why he was trying to get a list of them, thinking they would probably show a list of officers common to the new line and Mr. Ponder as Receiver of the San Antonio, Uvalde & Gulf Railroad; whereupon Mr. Williams, one of the attorneys for Respondents, stated that he knew the officers and would give them to Mr. Kelley if he would take them, and upon Mr. Kelley's acceptance, dictated as follows:

H. P. McMillen, President; E. R. Breaker, Vice-President; R. C. Tarbutton, Secretary and Treasurer, officers of the Asphalt Belt Railway.)

(Witness continuing) So far as I know, no other officers have been appointed. I don't think an Auditor and General Freight Agent has been appointed. I recall now that Mr. Breaker was elected Vice-President; I didn't think so a while ago, but that is right; I didn't think so then.

Complainants introduced in evidence contract dated June 2, 1923, between Frank Kell and W. T. Eldridge and the Texas Rock Asphalt Company, a copy of which contract, marked "Exhibit 1", is hereto attached.

Complainants introduced certified copy of the charter of the Asphalt Belt Railway Company, a copy whereof, omitting the acknowledgments and certificate, marked "Exhibit 2", is hereto attached.

"Q. I asked you this morning, Mr. Ponder, about whether a differential would be charged in the movement over this Asphalt Belt Railway in addition to the charge to or from Pulliam. You stated you were uncertain about that. To refresh your recollection, or does this contract refresh your recollection in that respect, by providing that the contractors,—that is, Kell and Eldridge, shall secure an order from the Texas Railroad Commission which will equalize the freight rates from the quarry or quarries of the Asphalt Company to all points in Texas with rates on the same class of material from the station Cline on the Southern Pacific line, to all points in Texas, and that the Asphalt Company shall not be required to commence construction of the eight miles to its mine or deposit the estimated cost thereof to be expended by the contractors for that purpose until such order is secured. Does that set you straight about whether a differential was to be charged over the Asphalt Belt?

A. No, I don't think that makes any difference, I think, —we have not got that order yet, haven't applied for it, as I understand it."

I have an order from the Railroad Commission of Texas from Pulliam, making the Cline rate maxima to and

from Pulliam. I have seen this paper (certified copy of the order of Railroad Commission) before; I think that is it.

Complainants introduced a certified copy of the order of the Railroad Commission, of date June 20, 1923, in evidence, a copy of which, marked "Exhibit 3", is hereto attached.

I stated this morning that taking the Asphalt Belt Railway and the San Antonio, Uvalde & Gulf together, I thought it would be a good thing for the promoters. I think taking the Asphalt Belt as an independent proposition, it could be operated at a profit if they could get the volume of business we hope to get. A few commodities inbound such as food and supplies and the like going to the commissary of the Texas Rock Asphalt Company, and this rock asphalt which will move outbound, is about all the business that can be expected over that line; there might be a few scattering shipments of live stock and something else, but that would be bulk of it. Those inbound shipments might move in what we would call way car or L. C. L. shipments, might move in box cars or caboose, way car. The equipment which moved in the loads might not move back out empty; there might be some wood or something of that kind to be loaded out. But in most instances, if it went in in box cars, the probabilities are the majority would come out empty; would be very little of that, though. These cars that the asphalt would come out in, practically all of those going in the mine would go in empty; so that as a practical result our empty car mileage would be substantially as large as our loaded car mileage, about the same. As to whether our expense of operation would be increased in that regard:

we would have to haul the empties in. Other expenses of operating a line of that kind would include salaries of a train crew, track crew and an agent; that would be about all. I don't know that a staff of general officers would draw any salaries. I did not state that the officers of the San Antonio, Uvalde & Gulf will perform the same services for this little company insofar as it needs them; Mr. Kell Mr. Eldridge and myself might in a supervisory way direct the operation of that line without our being out any salary, or being out any money, or very little time, but so far as the officers of the San Antonio, Uvalde & Gulf are concerned, they wouldn't do it gratis. We would not necessarily have to have a traffic man on a little line fifteen miles long, where there is no competitive business at all; I wouldn't want a traffic man. As to whether we would have to have a man to keep our rates up and prepare new rates and go to these meetings: that is very simple; when you have got a commodity going to move out, the people on the other line will be glad to get part of it.

Mr. Kell, Mr. Eldridge and I have an option to buy all the outstanding securities of the San Antonio, Uvalde & Gulf Railroad.

Yes, sir, I have been operating railroads for several years.

"Q. Do you think that a railroad company serving a substantial traffic could possible operate, even though it tried to do so, without moving and handling interstate and foreign shipments in view of the complexities of the business in this day and time, bearing in mind now in answering that question the declarations of the courts with which you are no doubt familiar, that the local billing does not

necessarily control the situation, but that the situation is controlled by the intention of the parties to the shipment at the time the shipments move?

A. I think so. I don't think the interstate traffic that line would have would amount to anything."

Possibly machinery will be hauled out there to those mines from time to time. It would be up to the miner rather than the railroad to get machinery from points in other states, in the ordinary and efficient management of these mines. Our attorney told us we could not do an interstate business, couldn't accept it. If the man running the mine has a shipment billed over other routes from New Orleans, Louisiana, to Houston, and he goes down there and pays the freight on the car and re-bills it from Houston over the St. Louis, Brownsville & Mexico Railway to Odem, and then over the San Antonio, Uvalde & Gulf to Pulliam, then over the Asphalt Belt Railway to the rock asphalt mines out there,—we would move it if it was state business; if interstate, there would be no rates applicable, and no tariffs, and we would stop it at Pulliam. When the billing came to me, the bill of lading would probably show where it was issued; and if it was state shipment, we would take it; if it was interstate, we would not. We would not take anything out there beyond Pulliam if it was a violation of the law.

"Q. But don't you know that once you turn down a shipment on through billing, that the fellow who wants to get it out there would thereafter resort to the device of local billing,—don't you know that is human nature?

A. Would be able to get it to Pulliam from interstate

points, and then would have to get it from there, or bill to Cline and get it there."

When he got it to Cline and paid the freight on it and tendered it to us as a local shipment, we would move it if it wasn't against the law. No, I am not going to hire a lawyer and keep him out there at that point for one case; I think a ruling from an attorney on one case would be sufficient to cover that. As to whether I know that I couldn't prevent the movement of interstate shipments over the rails of that kind of road: I don't think there would be but very little interstate traffic offered. No, I wouldn't admit that little in some way would find its way over that road. The rock asphalt people are not for a good while going to seek a market outside of the State of Texas; I don't think it will be necessary. I don't know what the future will bring forth, of course, in the development of that traffic.

Witness excused.

J. B. SMYTH, called by the Plaintiff, having been sworn, testified as follows:

DIRECT EXAMINATION

(By Mr. Kelley)

My name is J. B. Smyth. I reside in Bexar County, Texas. Mr. W. A. Smith, the other individual complainant, resides in Jefferson County, Texas. The Uvalde Rock Asphalt Company is a Texas Corporation, with its principal office under its charter in Beaumont, Jefferson County, Texas. I am one of the defendants in the condemnation suit that has been instituted in Uvalde County by the Asphalt Belt Railway Company. W. A. Smith and myself own the land that is described in the petition in the condemna-

tion suit pending in Uvalde Vounty, subject to some mineral rights of the Uvalde Rock Asphalt Company, so that the three of us together own complete title to it. Starting along the route described in this condemnation suit indicated by the maps of the Asphalt Belt Railway Company, at the northwest terminus of that line, and going eight miles, I think that would carry us about two miles through our land, on the Smyth Estate lands, go through ours. The last eight miles of this proposed line includes all of the land that is described in this condemnation suit. I was served with notice of this condemnation suit, and appeared out there before the Commissioners about two weeks ago tomorrow, and at that time the Commissioners postponed the hearing until tomorrow—in other words, gave us two weeks postponement. The lawyers for the plaintiff in that case and Mr. Ponder indicated they intended to proceed as rapidly as they could with that condemnation suit; wouldn't give us any time at all. Mr. Ponder was in our office one day talking to Mr. Doyle and I about the construction of a railroad from Pulliam out into that general territory, through or by our mines, but the exact time I don't know; I am sure it was just before the incorporation of the Asphalt Belt Railway, but he didn't at any time mention any Asphalt Belt. They did not mention at that time anybody building except the San Antonio, Uvalde & Gulf. Prior to the incorporation of this Asphalt Belt Railway Company, J. R. Hanby, of Denison, or Mr. Kell, of Wichita Falls came to Beaumont to see me—the morning of the 5th. Mr. Hanby never once mentioned the Asphalt Belt Railroad; he said Mr. Kell and the Sausage, by which I mean the San Antonio, Uvalde & Gulf. This rock asphalt that is under

our premises shows on the surface in some places; others we have got to core drill to find it; majority of the places it lies below the surface—it does in a few places. Its deposits are not uniform either in size or shape or thickness; they are all sizes and all shapes and all depths. The same deposit varies in thickness in different places, from 18 inches to 20 or 40 feet, just take it right down. This proposed right of way which is described in this condemnation suit passes over deposits of this rock asphalt on our land; I know that by coring it, and it shows on the surface. Coring on the right of way, we have got two tests made, and it shows on the surface on part of it, and it is a point of the country we know what is usually under it. We have drilled two test holes on this right of way; Mr. Smith there has a log of the two test holes. They use a diamond core drill in drilling these holes; it is according to the depths of that hole, might dig a hole through gravel, and have to use two more men, use a driller and two helpers. There is no other way to discover whether this stuff is under the ground, because if you drill anything else it just chews it all up. It has been costing us 80, 85 and $1.00 a foot to drill these core drill holes; where we have got gravel to dig, it costs us about $1.15.

I am President of the Uvalde Rock Asphalt Company.

That conversation I had with Mr. Hanby was on the morning of the 6th, the day when this condemnation suit was filed out in Uvalde County.

Witness excused.

PLAINTIFFS REST.

* * * *

DEFENDANTS' TESTIMONY.

MR. WILLIAMS: (One of the attorneys for defendants) We agree with counsel, without putting any witnesses on the stand, that the Texas Rock Asphalt Company has been in operation about two years, and never has sold any asphalt outside of the State of Texas; and in connection with that, on the other hand, that the Uvalde Rock Asphalt Company does sell and has sold outside of the State of Texas.

THE COURT: How long has the Texas Rock Asphalt Company been in active operation?

MR. WILLIAMS: Two years.

THE COURT: To what extent, in approximate figures, what amount of tonnage have they been moving to market?

MR. BOYLE: Handle from 30,000 to 35,000 tons a year.

MR. KELLEY: In car loads?

MR. BOYLE: Yes, sir.

MR. KELLEY: How many a month?

MR. BOYLE: I couldn't tell you by the month.

THE COURT: Is that asphalt company, is that tributary to the Southern Pacific Company at Cline?

MR. BOYLE: All of that stuff is teamed to Cline, and shipped from Cline.

THE COURT: I notice there is a spur there?

MR. BOYLE: The spur at Cline runs to Uvalde Rock Asphalt Company's mine.

THE COURT. Yes, sir.

MR. BOYLE: The Southern Pacific runs to the Uvalde Rock Asphalt Company. The Texas Rock Asphalt Com-

pany has no rails of any kind, all of its business has been teamed to Cline and from there shipped over the Southern Pacific.

THE COURT: How far do they team it?

MR. BOYLE: Team it about eight miles.

THE COURT: The particular purpose then of this line, whether it be public, private or unlimited, is for the purpose of reaching the asphalt mines of the Texas Rock Asphalt Company?

MR. BOYLE: Yes, sir.

THE COURT: All right. And do I understand it is the purpose of the Texas Rock Asphalt Company and of the Asphalt Belt Railway Company to limit their business operations to intrastate traffic?

MR. BOYLE: Yes, sir.

MR. WILLIAMS: Strictly.

DEFENDANTS REST.

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At the instance of the plaintiffs the defendants agreed that A. R. Ponder, Receiver of the San Antonio, Uvalde & Gulf Railroad, is and for a long time prior to any of the dates mentioned herein has been engaged in inter-state commerce and is subject to the Interstate Commerce Act.

Filed and submitted:
FRANK ANDREWS,
ROBERT H. KELLEY,
Solicitors for Appellants.

The foregoing statement of the evidence is hereby approved and agreed to.

R. J. BOYLE
G. W. WHARTON
MASON WILLIAMS
Solicitors for Appellees.

No objection having been made to the foregoing statement of the evidence, the same is hereby approved as a full, true and correct statement of the evidence introduced, as aforesaid.

WITNESS MY HAND on this the 19th day of September, A. D. 1923.

DuVAL WEST
United States District Judge

(COPY)

EXHIBIT 1

THE STATE OF TEXAS
COUNTY OF BEXAR

THIS CONTRACT entered into between Frank Kell, of Wichita County, Texas, and W. T. Eldredge, of Fort Bend County, Texas, hereinafter called the Contractors, and the Texas Rock Asphalt Company, a Delaware corporation, having a permit to do business in Texas, with its principal Texas office in San Antonio, Texas, hereinafter called the Asphalt Company,

WITNESSETH:

(1)

The Contractors hereby agree to do and perform the following things:

(a) To construct, or have constructed, a standard gauge railroad from a point about one (1) mile south of Pulliam, Texas, a station of the San Antonio, Uvalde & Gulf Railroad in Uvalde County, to a point within eight (8) miles of the rock asphalt mine of the Asphalt Company in Uvalde County, Texas, on Section 536, Uvalde County, Texas; said road to be constructed as near as practical along

the line the Contractors have already surveyed, as shown by blueprint hereto attached, marked in red, and made a part hereof.

(b) To begin construction of said line within thirty (30) days after the right of way thereof is made available either by purchase or condemnation, and to complete said construction within ninety (90) days from the date of the commencement thereof.

(c) To purchase or condemn a fifty (50) foot right of way from a point where the line of the Contractors ends to the rock asphalt quarry owned by the Rock Asphalt Company, located on Section 536, Uvalde County, Texas.

Provided, however, that said right of way shall be paid for by the Asphalt Company; and provided further that if the right of way be acquired by purchase the price shall be subject to the approval of the Asphalt Company; and if it has to be acquired by condemnation the Asphalt Company shall pay the price awarded by the Court, plus the Court costs, provided the price is acceptable to both parties hereto.

Provided further that if the award of the commissioners be either finally raised or lowered on appeal the amount of the final award shall be adjusted accordingly, so that the Asphalt Company will pay only the amount of the final award, including court costs, and the Contractors or their assigns shall pay to the Asphalt Company only such final award, plus court costs.

The Contractors will have their attorneys condemn the land, and the Asphalt Company shall not be required to pay any attorneys' fees except that the Asphalt Company may have their attorneys assist in all condemnation, but

the Contractors shall not be liable for any fees to the attorneys of the Asphalt Company.

(d) When said right of way is available for the extension of said line hereinabove provided to be built by the Contractors from the said point within eight (8) miles of said Rock Asphalt mine, as shown by the blueprint hereto attached, the said contractors shall at once furnish the Asphalt Company with an estimate of the costs of the construction of said extension, and the said Asphalt Company shall within ten (10) days after such estimate is furnished either elect to construct said eight (8) mile extension or request the Contractors to construct same, and in the event the Asphalt Company elects to construct same it shall commence construction within twenty (20) days thereafter and complete the same within ninety (90) days; on the other hand, if the Asphalt Company so elects, it may request the Contractors within said ten (10) days to construct said eight (8) mile extension and, if so, shall at the time it requests the Contractors to construct same, deposit in a San Antonio bank the amount of said estimated cost with authority to Contractors to pay out said funds for such construction work as they previously estimated, approved by the Contractors' engineer, and the Contractors agree and bind themselves in such event to pay the costs of such construction, if any, in excess of said estimated amount so deposited in the bank, and should the cost of said construction be less than said estimated amount, the difference between the actual and the estimated cost so deposited in the bank shall be returned to the Asphalt Company.

It is especially understood and agreed between the par-

ties, however, that the Contractors shall not be required to commence construction of the part of said railway lines described in subdivision (a) of this paragraph until right of way for the entire line to the Asphalt Company's mine is available and that the construction of that part of the line, and the part described in subdivision (c) after the right of way is available shall be proceeded with as expeditiously as possible whether such part of line is built by the Contractors or the Asphalt Company.

(e) When the entire line is completed, as provided for hereinbefore and hereinafter, the Contractors or their assigns will take charge of said entire line and maintain and operate the same, free of cost to the Asphalt Company, and construct all sidings or other tracks necessary for their operation at their expense.

(f) To pay to the Asphalt Company the entire cost of construction of said eight (8) miles hereinafter provided for, in the following manner, that is to say: The Contractors or their assigns will pay to the Asphalt Company the sum of ten dollars ($10.00) per car for each and every carload of freight moved in or out over said line, consigned to or from the Asphalt Company, destined to or from the quarry of the Asphalt Company. This shall continue until the entire cost of said eight (8) miles has been paid.

There shall be no interest charged on the cost of the eight (8) miles of track hereinafter specified to be constructed by the Asphalt Company. Any other person, association or corporation that may desire to ship any commodity shall be allowed, subject to the approval of the Contractors, to connect their spurs or switches at any point along the line they may desire, and the Contractors or

their assigns shall have the right to transport or haul the freight thus offered over any portion or all of said line.

(g) To secure an order from the Texas Railroad Commission which will equalize the freight rates from the quarry or quarries of the Asphalt Company to all points in Texas, with rates on the same class of material from the station of Cline on the Southern Pacific Lines to all points in Texas; and the Asphalt Company shall not be required to commence construction of the eight (8) miles to its mine or deposit the estimated cost thereof to be expended by the Contractors for that purpose until such order is secured.

(2)

The Asphalt Company hereby agrees to do the following things:

(a) To construct a standard gauge railroad from its rock asphalt mines in Uvalde County, Texas, in an easterly direction, along the line which the Contractors have recently surveyed, and which is shown in the attached blueprint and marked in red, or as near as practical thereto, for a distance of eight (8) miles from the quarry of the Asphalt Company, and to connect with the line to be constructed by the Contractors, or request the Contractors to construct same as hereinabove provided.

(b) To pay for the right of way of fifty (50) feet wide used in the construction of said eight (8) miles of railroad; and in the event it is necessary to condemn the right of way or any part of it, to pay the award of the commissioners, plus all court costs, but not including attorneys' fees, except the fees of attorneys whom the Asphalt

Company itself may employ in condemning said right of way, provided said cost of said right of way is approved by both parties.

(c) Should the Asphalt Company build and construct the eight (8) miles of line hereinabove described instead of having the same constructed by the Contractors as hereinbefore provided for, said line shall be constructed on the line to be located by the engineer of the Contractors or their assigns and to construct said line under the supervision of and subject to the approval of the engineers of the Contractors in all its details, including all material used on said eight (8) miles of line; and in no event shall the Asphalt Company use less than fifty-six (56) pound rails, and such rails shall not be of a lower grade than No. One (1) Relayers, with suitable angle bars, spikes and ties; provided, however, that the Contractors will use in such construction any rail of not less than fifty-six (56) pounds and of no lower grade than number one (1) relayers, with suitable angle bars, spikes and ties as may be furnished them by the Asphalt Company.

There will be no charge made for the engineering services furnished by the Contractor and this engineering service shall include the location and staking out of the line.

(d) To construct and maintain, at its own cost and expense, and all spurs, side tracks, or yards that may be or may become necessary for its use in the operation of the quarry of the Asphalt Company now under operation, or which may hereafter be placed under operation, provided, however, that the Contractors or their assigns shall not be required to go upon any tracks constructed by the Asphalt Company in its quarry unless and until such tracks

are made safe for operation in the opinion of the Contractors or their assigns or the designated representatives of either.

(e) To execute and deliver to the Contractors a good and sufficient bond in the sum of One Hundred Thousand Dollars ($100,000.), conditioned that when the right of way for said line to the quarry of the Asphalt Company is made available by purchase or condemnation as herein provided, and the equalization rate order hereinbefore referred to obtained, the Asphalt Company will either deposit for the use of the Contractors in the construction of the eight (8) miles hereinabove described the estimated cost thereof as hereinabove provided or will build and construct said eight (8) miles to its quarry within ninety (90) days, or to pay the Contractors or their assigns such damages as may be sustained by reason of the failure of the Asphalt Company so to do.

(f) To convey to the Contractors, their successors or assigns, or to anyone designated by them, said eight (8) miles of railroad agreed herein to be constructed by the Asphalt Company, free of all claims and encumbrances, when the Contractors, their successors or assigns, have paid to the Asphalt Company the original cost, without interest, of said eight (8) miles of railroad. It must be understood, however, that the ownership of the Contractors, or their successors or assigns, of the said eight (8) miles of railroad herein agreed to be built by the Asphalt Company, will at all times be in the same proportion as the amount the Contractors, or their assigns, have paid to the Asphalt Company—as said amounts so paid bear to the total cost of construction of said eight (8) miles of rail-

road, and the Contractors or their assigns each year shall pay such proportion of the taxes; provided that if for any reason the operation of this road or spur by the Contractors or their assigns should be abandoned because the Asphalt Company and others who may connect therewith shall cease to make shipments thereon, after its completion, the Contractors or their assigns are to have the title to the salvage in the same proportion as above indicated; provided further that the Asphalt Company at no time shall have any right, title or interest in and to that part of the line between the S. A. U. & G. road and a point eight (8) miles from the mine, herein agreed to be constructed by the Contractors or their assigns.

(g) The Asphalt Company agrees and guarantees that there will be a total of not less than One Hundred and forty-four thousand (144,000) tons of freight moved out over the line herein proposed to be built, during the first three (3) years after the said line is completed and put in operation, and for each ton short of this amount the Asphalt Company or its assigns shall pay to the Contractors or their assigns the sum of twenty-five cents (25c) per ton by crediting on the purchase price to be paid for said railroad by the Contractors to the Asphalt Company the amount so deficient, This amount of one hundred and forty-four thousand (144,000) tons shall include all of the asphalt moved out of said territory over this line whether originating at the quarry of the Asphalt Company or any other quarry, which is now owned or may hereafter be established on said line or contiguous thereto.

(h) As a part of the consideration of this contract, the Asphalt Company agrees to ship over this line the total

output of the asphalt rock of its said quarry until the payment of ten dollars ($10.00) per car equals the total cost of the eight (8) miles of track to be constructed including the cost of the right of way for said eight (8) miles, and it is especially understood and agreed that the provision of subdivision (g) of this paragraph, for the crediting on the purchase price of the tonnage short on the guaranteed tonnage for three (3) years at twenty-five cents (25c) per ton, shall not affect this obligation and that the Asphalt Company is obligated to ship all of its tonnage over said line until the number of cars shipped at ten dollars ($10.00) per car equals the cost of said eight (8) miles of track including right of way, notwithstanding a part of the purchase price may be credited as provided in subdivision (6)

(3)

It is distinctly agreed and understood between the parties hereto that the Contractors shall within thirty (30) days from date hereof do all things necessary to enable the Contractors to commence within said thirty (30) days the acquisition of said right of way for said proposed railroad by purchase or condemnation and will proceed as expeditiously as possible to acquire such right of way by purchase or condemnation and within thirty (30) days after said right of way is available will obtain said equalization rate order and commence construction of said railroad and prosecute the same to completion within ninety (90) days; provided the Asphalt Company has performed the conditions herein imposed upon it with reference to said railroad; provided further that should the construction of said railroad be delayed by legal proceedings the time of such delay

shall not run against the Contractors. If the Contractors do not within thirty (30) days commence such proceedings for the acquisition of right of way or after the acquisition thereof and the compliance by the Asphalt Company with its obligations do not commence construction of said railroad within thirty (30) days thereafter and obtain the equalization rate order hereinabove referred to, this contract shall be null and void and no longer binding on either party hereto.

WITNESS OUR HANDS in duplicate this 2nd day of June, A. D. 1923.

(Signed) Frank Kell
" W. T. Eldridge
The Contractors.

TEXAS ROCK ASPHALT COMPANY
By (Signed) O. C. Chapin
Vice President.

ATTEST
(Signed) R. J. Boyle, Secretary.

WITNESS: (Signed) A. R. Ponder.

EXHIBIT 2

STATE OF TEXAS )
COUNTY OF BEXAR )

KNOW ALL MEN BY THESE PRESENTS:

That we, H. P. McMillan, R. C. Tarbutton, R. H. Schultz, E. R. Breaker, F. L. Lewis, R. C. Hollifield, R. A. Yelton, Henri Bovy, T. M. McCarthy, and Mason Williams, all being subscribers to the capital stock of the railroad corporation hereinafter mentioned, have this day associated ourselves and do associate ourselves together for the purpose of forming a railroad corporation under the laws of the State of

Texas, for the purpose of constructing, owning, maintaining and operating a line of railroad, as follows:

From a point on the rails of the San Antonio, Uvalde & Gulf Railroad Company, about one mile South of the station of Pulliam in Zavala County, Texas; thence in a northwesterly direction through a portion of Zavala County into Uvalde County, to a point in Uvalde County at or near the mines of the Texas Rock Asphalt Company, a distance of about twenty miles from the beginning point; and we do hereby adopt and sign these articles of incorporation of said Railroad Company:

I.

The name of the corporation shall be the Asphalt Belt Railway Company.

II.

It is intended by said corporation, the Asphalt Belt Railway Company, to construct, own, maintain and operate its proposed line of railroad from a point on the rails of the San Antonio, Uvalde & Gulf Railroad Company, about one mile south of the station of Pulliam, in Zavala County, Texas; thence in a northwesterly direction into Uvalde County at a point near the mines of the Texas Rock Asphalt Company; all of said line of railroad to lie wholly within the State of Texas; and the approximate length of said line of railroad shall not exceed twenty (20) miles.

The corporation shall have all the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including the power to construct and extend.

III.

The place at which the principal office of said corporation shall be established and maintained is the City of San Antonio, in Bexar County, Texas.

IV.

The time of the commencement of the corporation shall be the date of the filing of these Articles of Incorporation in the office of the Secretary of State of the State of Texas, and the period of the continuation of the Corporation shall be fifty (50) years from the time of its commencement.

V.

The amount of the capital stock of the corporation shall be Twenty Thousand Dollars ($20,000).

VI.

The names and places of residence of the several persons forming the association for incorporation are as follows:

| Name | Place of Residence |
|---|---|
| H. P. McMillan, | San Antonio, Texas, |
| R. C. Tarbutton, | San Antonio, Texas, |
| R. H. Schultz, | San Antonio, Texas, |
| E. R. Breaker, | North Pleasanton, Texas, |
| F. L. Lewis, | North Pleasanton, Texas, |
| Mason Williams, | San Antonio, Texas, |
| R. C. Hollifield, | Uvalde, Texas, |
| R. A. Yelton, | San Antonio, Texas, |
| Henri Bovy, | San Antonio, Texas, |
| T. M. McCarthy, | San Antonio, Texas. |

VII.

The names of the members of the first Board of Directors of the Corporation are as follows:

| Name | Place of Residence |
|---|---|
| H. P. McMillan, | San Antonio, Texas, |
| R. C. Tarbutton, | San Antonio, Texas, |
| R. H. Schultz, | San Antonio, Texas, |
| E. R. Breaker, | North Pleasanton, Texas, |
| F. L. Lewis, | North Pleasanton, Texas, |
| R. C. Hollifield, | Uvalde, Texas, |
| Mason Williams, | San Antonio, Texas. |

The government of the corporation, and the management of its affairs shall be vested in a Board of Directors, composed of seven persons, each of who shall be a stockholder in the Corporation, a President, and one or more Vice-Presidents, and such other officers and agents as the corporation by its by-laws may prescribe.

VIII.

The number and amount of the shares of the capital stock of the corporation shall be two hundred (200) shares of common stock of the par value of One Hundred Dollars ($100) each.

Witness our hands this 4th day of June, 1923.

H. P. McMILLAN,
R. C. TARBUTTON,
R. H. SCHULTZ,
R. C. HOLLIFIELD,
F. L. LEWIS,
E. R. BREAKER,
MASON WILLIAMS,
T. M. McCARTHY,
HENRY BOVY,
R. A. YELTON

EXHIBIT 3.

RAILROAD COMMISSION OF TEXAS

AUSTIN.

CIRCULAR NO. 5890.

Amending Commodity Tariff No. 9-B.

(Hearing No. 2232. June 12, 1923)

Austin, Texas, June 20, 1923.

In approval of application number 29 of the San Antonio, Uvalde & Gulf Railroad Company, and in pursuance of notice and hearing in the above numbered cause, it is hereby ordered by the Railroad Commission of Texas that Commodity Tariff No. 9-B, issued by this Commission to apply on Stone, Sand, Gravel, etc., transported by railroads between points in Texas, be and the same is hereby amended by adding to Section 3 thereof the following exception:

"19. Pulliam—Observance of "Cline" rates as maxima from.—Rates currently applicable to shipments of Rock Asphalt and similar commodities, carloads, from Cline, Texas (station on the Galveston, Harrisburg & San Antonio Railway) to points in Texas, shall be observed as maxima on shipments of like commodities, in carloads, from Pulliam, Texas (station on the San Antonio, Uvalde & Gulf Railroad) to the same points in Texas."

Effective not less than five days after publication by carriers, but not later than August 1, 1923.

CLARENCE E. GILMORE
Chairman.

W. A. NABORS
WALTER SPLAWN
Commissioners.

(Seal)

Attest:
E. R. McLEAN,
Secretary.

I hereby certify that the above is a true and correct copy of Circular No. 5890, this day adopted by the Railroad Commission of Texas.

Given under my hand and the seal of said Commission, at the City of Austin, this the 20th day of June, 1923.

E. R. McLEAN, Secretary.

ENDORSED: No. 267 Eq. J. B. Smyth, et al., vs Asphalt Belt Railway Company, et al. Statement of Evidence. Filed 19th day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

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## PETITION FOR APPEAL AND ORDER OF ALLOWANCE.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AT SAN ANTONIO.

J. B. Smyth, Et Al.,

-vs-

Asphalt Belt Railway Company, Et Al.

In Equity No. 267.

PETITION FOR APPEAL AND ORDER OF ALLOWANCE.

The Complainants in the above entitled and numbered cause, to-wit, J. B. Smyth, W. A. Smith and Uvalde Rock Asphalt Company, considering themselves aggrieved by the order and decree entered in said cause on the 14th day of September, 1923, denying their application for an interlocutory injunction and dismissing their Bill of Complaint, as amended, pray that an appeal may be allowed them

from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors filed herewith and that a transcript of the record, proceedings and papers, upon which said order and decree was made, duly authenticated, may be transmitted forthwith to the United States Circuit Court of Appeals for the Fifth Circuit.

FRANK ANDREWS,
ROBERT H. KELLEY,
Solicitors for said Complainants
and Appellants,
Union National Bank Building,
Houston, Texas.

September 19th, 1923.

And now, on, to-wit, the 19th day of September, 1923, the above named petitioners having filed their Assignment of Errors and otherwise conformed to the statutes and rules in such case made and provided,

IT IS ORDERED that the appeal be allowed as prayed for in the foregoing petition and made returnable on the 19th day of October, 1923; and the Clerk is directed to transmit forthwith to the United States Circuit Court of Appeals for the Fifth Circuit a properly authenticated transcript of the record and proceedings.

DuVAL WEST
U. S. District Judge.

Entered Vol 2 page 159

ENDORSED: In Equity No. 267 J. B. Smyth, et al. -vs- Asphalt Belt Rwy. Co., et al. Petition for Appeal and Order of Allowance Filed 19th day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

## ASSIGNMENT OF ERRORS

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AT SAN ANTONIO.

J. B. Smyth, Et Al.,

-vs-

Asphalt Belt Railway Company, Et Al.

In Equity No. 267.

### ASSIGNMENT OF ERRORS

COME NOW J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, Appellants, and make and file this their Assignment of Errors, and say that the District Court of the United States for the Western District of Texas, San Antonio Division, and the Judge thereof, in the judgment, order and decree entered herein on the 14th day of September, 1923, erred in the following and each of the following respects, to-wit:

1.

In denying and refusing the application of Appellants for an interlocutory injunction as prayed for in their Bill of Complaint on file herein, as amended.

2.

In granting and sustaining the motions of Defendants to dismiss Appellants' Bill of Complaint, as amended, and in dismissing the same.

3.

In holding and deciding that the District Court of the United States for the Western District of Texas had no jurisdiction of the cause of action set up in Appellants'

Bill of Complaint, as amended, and in dismissing the same for lack of jurisdiction.

4.

In holding and deciding that the line of railroad proposed to be constructed by the Appellees, and especially by the Appellee Asphalt Belt Railway Company, is not, in truth and in fact, under the undisputed evidence in this case, an extension of the existing line of railroad owned by the Appellee San Antonio, Uvalde & Gulf Railroad Company, and operated in interstate and foreign commerce by the Defendant A. R. Ponder, Receiver of the properties and assets of San Antonio, Uvalde & Gulf Railroad Company.

5.

In failing and refusing to hold and decide, under the undisputed evidence in this case, that the existing line of railroad owned by the Defendant San Antonio, Uvalde & Gulf Railroad Company and operated by the defendant A. R. Ponder, Receiver of the properties and assets of San Antonio, Uvalde & Gulf Railroad Company, is engaged in interstate commerce; that the line of railroad proposed to be constructed by Appellees, and especially by the Appellee Asphalt Belt Railway Company, is an extension of said existing line of railroad, and that the construction of said proposed line of railroad can not lawfully be accomplished or carried on but should be enjoined, no certificate of public convenience and necessity relating thereto having been issued by the Interstate Commerce Commission in accordance with the provisions of Section 1 of the Act of Congress known as the Interstate Commerce Act.

6.

In holding and deciding that the line of railroad proposed to be constructed by the Appellees, and especially by the Appellee Asphalt Belt Railway Company, is of such character that the failure to procure a certificate of public convenience and necessity for the construction and operation thereof from the Interstate Commerce Commission under Section 1 of said Interstate Commerce Act, does not render the construction of said proposed line of railroad unlawful and subject to be enjoined under the terms and provisions of Section 1 of said Interstate Commerce Act.

7.

In failing and refusing to hold and decide, under the undisputed evidence, that the Appellee Asphalt Belt Railway Company is, within the meaning and intent of the Interstate Commerce Act and of Section 1 thereof, a carrier by railroad subject to said Act and engaged in interstate comerce, as defined in said Act, and, no certificate of public convenience and necessity for the construction or operation of said proposed line of railroad having been obtained from or issued by the Interstate Commerce Commission under Section 1 of said Act, the District Court of the United States for the Western District of Texas, San Antonio Division, in which District and Division the Appellees, and each of them, reside and have their domiciles, and in which said proposed line of railroad is to be constructed, has jurisdiction to, and should by order entered in this cause, enjoin and restrain the construction of said proposed line of railroad, because the same is unlawful and in contravention of the terms, spirit and intent of Section 1

of the Act of Congress known as the Interstate Commerce Act.

8.

In failing and refusing to hold, decide and decree that the construction of the line of railroad proposed to be constructed by the Appellees herein, and especially by the Appellee Asphalt Belt Railway Company, is unlawful and in violation of the terms, spirit and intent of Section 1 of the Act of Congress known as the Interstate Commerce Act and should be enjoined and restrained as prayed for in Appellants' Bill of Complaint, as amended.

9.

In failing and refusing to hold and decide that the proceeding for condemnation, instituted by the Appellee Asphalt Belt Railway Company, before the County Judge of Uvalde County, Texas, against Appellants J. B. Smyth and W. A. Smith, and now pending in the County Court of Uvalde County, Texas, is an integral part of the construction of said proposed line of railroad and that the prosecution thereof may and should be enjoined and restrained by the District Court of the United States for the Western District of Texas, San Antonio Division, under the terms and provisions of Section 1 of the Act of Congress known as the Interstate Commerce Act, notwithstanding the terms and provisions of Section 720 of the Revised Statutes of the United States, being Section 265 of the Judicial Code of the United States.

10.

In holding and deciding that Section 720 of the Revised Statutes of the United States (Judicial Code, Section 265) forbids the said District Court from enjoining or restraining the prosecution of said condemnatioin proceeding, now pending in the County Court of Uvalde County, Texas.

11.

In holding and deciding that the use to which the private property of Appellants J. B. Smyth and W. A. Smith is sought to be appropriated by the condemnation proceeding now pending against them on the petition of the Appellee Asphalt Belt Railway Company, in the County Court of Uvalde County, Texas, is a public use to which the private property of said Appellants may be appropriated by the exercise of the power of eminent domain without depriving said Appellants, and each of them, of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

12.

In failing and refusing to hold and decide that, under the undisputed evidence in this case, the condemnation proceeding instituted by the Appellee Asphalt Belt Railway Company against the Appellants J. B. Smyth and W. A. Smith, and now pending in the County Court of Uvalde County, Texas, will, if prosecuted to effect, deprive said Appellants, and each of them, of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the property of said Appellants is, by said proceeding, sought to be appro-

priated to a private and not a public use, and will, if said proceeding be prosecuted to effect, appropriate the private property of said Appellants to the private use of a private corporation, to-wit, Texas Rock Asphalt Company.

13.

In holding and deciding that these Appellants, and each of them, are not parties in interest, entitled as such, under the terms and provisions of Section 1 of the Interstate Commerce Act, to have the constructioin of said proposed line of railroad, and the prosecution of said condemnation proceeding in aid and furtherance thereof, enjoined and restrained, because in violation of Section 1 of said Act.

14.

In failing and refusing to hold and decide that the Appellants, and each of them, are parties in interest, entitled as such, under the provisions of Section 1 of the Interstate Commerce Act, to have the construction of said proposed line of railroad, and the prosecution of said condemnation proceeding in aid and furtherance thereof, enjoined and restrained, because in violation of Section 1 of said Act.

15.

In holding and deciding that the District Court of the United States for the Western District of Texas is not a court of competent jurisdiction within the meaning and intent of paragraph (20) of Section 1 of the Act of Congress known as the Interstate Commerce Act.

WHEREFORE, Appellants jointly and severally pray that the said order, judgment and decree dismissing their

Bill of Complaint, as amended, and denying their application for an interlocutory injunction, be reversed and set aside with directions that said application be granted and for such other and further relief as may be appropriate.

FRANK ANDREWS.

ROBERT H. KELLEY.

Solicitors for Appellants,

Address: Union National Bank Bldg.,

Houston, Texas.

Read in connection with

Petition for Appeal, Sept. 19th, 1923.

DuVAL WEST

District Judge.

ENDORSED: In Equity No. 267 J. B. Smyth et al. -vs- Asphalt Belt Rwy. Co. Assignments of Error. Filed 19th day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

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## BOND ON APPEAL.

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BOND ON APPEAL.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TEXAS

AT SAN ANTONIO.

J. B. Smyth, Et Al.,

-vs-

Asphalt Belt Railway Company, Et Al.

In Equity No. 267.

KNOW ALL MEN BY THESE PRESENTS: That we, J. B. Smyth and W. A. Smith and Uvalde Rock Asphalt

Company, a corporation, as Principals, and Southern Surety Company, Des Moines, Iowa, as Surety, are held and firmly bound unto Asphalt Belt Railway Company, a corporation, San Antonio, Uvalde & Gulf Railroad Company, a corporation, and A. R. Ponder, Receiver of the properties and assets of San Antonio, Uvalde & Gulf Railroad Company, and each of them, in the full and just sum of One Thousand Dollars ($1,000.00), to the payment whereof, well and truly to be made, we, and each of us, and our, and each of our heirs, executors, administrators, assigns, and successors, are by these presents, jointly and severally, firmly held and bound.

SEALED with our seals and dated this the 19th day of September, in the year of our Lord, 1923.

WHEREAS, lately, in the District Court of the United States for the Western District of Texas, San Antonio Division, in a suit depending on the Equity Docket of said Court, No. 267, between the above bound Principals as Plaintiffs, and the above bound obligees as Defendants, an order, judgment and decree was rendered and entered denying the application of said Plaintiffs for an interlocutory injunction and dismissing the Bill of Complaint of said plaintiffs as amended, and the above bound Principals having obtained an appeal and filed a copy thereof in the office of the Clerk of said Court to reverse the judgment, order and decree in the aforesaid suit, and a citation directed to the above bound obligees citing and admonishing them and each of them, to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held in the City of New Orleans in said Circuit within thirty (30) days from the issuance of said citation;

NOW, THEREFORE, the condition of the foregoing obligation is such, that if the above bound Principals shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

J. B. SMYTH, (Seal)
By R. H. KELLEY, his Solicitor of Record.
W. A. SMITH, (Seal)
By R. H. KELLEY, his Solicitor of Record.

(Seal)

UVALDE ROCK ASPHALT COMPANY
By W. J. DOYLE
Vice President
Principals.

SOUTHERN SURETY COMPANY
L. B. JOYCE
Attorney in fact (Seal)
Surety

Attest:

JNO. L. GRIFFITH,
Assistant Secretary

The foregoing obligation acknowledged before me this 19th day of September, 1923, by J. B. Smyth and W. A. Smith, through R. H. Kelley, their Solicitor, and by Uvalde Rock Asphalt Company, through W. J. Doyle, its Vice President:

Witness my hand and official seal:

(Seal) M. PERCE MORGAN
Notary Public in and for
Bexar County, Texas.

Approved and ordered filed this 19th day of September, 1923.

DuVAL WEST

U. S. District Judge.

ENDORSED: In Equity No. 267 J. B. Smyth, et al. -vs- Asphalt Belt Railway Co. Bond on Appeal Filed 19th day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

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## CITATION

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### CITATION ON APPEAL.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TEXAS

AT SAN ANTONIO.

J. B. Smyth, Et Al.,

-vs-

Asphalt Belt Railway Company, Et Al.

In Equity No. 267.

UNITED STATES OF AMERICA ss

TO Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf Railroad Company and A. R. Ponder, Receiver of the properties and assets of the said San Antonio, Uvalde & Gulf Railroad Company, GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, to be held in the City of New Orleans, in the State of Louisiana, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States

for the Western District of Texas, San Antonio Division, wherein J. B. Smyth, W. A. Smith and Uvalde Rock Asphalt Company are Appellants, and Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf Railroad Company and A. R. Ponder, Receiver of the propertiess and assets of San Antonio, Uvalde & Gulf Railroad Company, are Respondents, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable DuVal West, Judge of the United States District Court for the Western District of Texas, San Antonio Division, this the 19th day of September, 1923.

DuVAL WEST
Judge

Attest:

D. H. HART, Clerk,
By T. H. THOMPSON,
Deputy

(Seal)

Service of the within citation and receipt of copy thereof admitted this the 19 day of September, 1923.

R J BOYLE
G. W. WHARTON
MASON WILLIAMS
Solicitors for Appellees.

ENDORSED: In Equity No. 267 J. B. Smyth, et al., -vs- Asphalt Belt Rwy. Co., et al. Citation Filed 19th day of September 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

## PRAECIPE FOR RECORD.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF TEXAS,
AT SAN ANTONIO.

J. B. Smyth, Et Al.,

-vs-

Asphalt Belt Railway Company, Et Al.

No. 267 In Equity

PRAECIPE FOR RECORD.

To the Clerk of said Court:

You are requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to an appeal allowed in the above entitled and numbered cause, and to include therein the following papers and orders, to-wit:

1. Caption.
2. Bill of Complaint.
3. Answer of San Antonio, Uvalde & Gulf Railroad Company.
4. Answer of A. R. Ponder, Receiver San Antonio, Uvalde & Gulf Railroad Company.
5. Answer of Asphalt Belt Railway Company.
6. First Amended Bill of Complaint.
7. Motion to Dismiss Bills.
8. First Supplemental Answer.
9. Interlocutory Order of July 30, 1923.
10. Second Amended and Supplemental Bill of Complaint.
11. Motion of Defendants to Dismiss Second Amendment to Bill.

12. Second Amended Answer of Asphalt Belt Railway Co.
13. Decree.
14. Memorandum Opinion on Defendants' Motion to Dismiss.
15. Statement of Evidence.
16. Petition for Appeal and Order of Allowance.
17. Assignment of Errors.
18. Bond on Appeal.
19. Citation and Acceptance of Service.
20. Praecipe for Record.
21. Clerk's Certificate.

FRANK ANDREWS
ROBERT H. KELLEY
Solicitors for Appellants.

The Appellees do not desire any papers incorporated in the record in addition to those listed in the foregoing praecipe.

R. J. BOYLE
G. W. WHARTON
MASON WILLIAMS
Solicitors for Appellees.

ENDORSED: No. 267 In Eq. J. B. Smyth, et al vs Asphalt Belt Railway Company, et al. Praecipe for Record Filed 19th day of Sept. 1923 D. H. Hart, Clerk by T. H. Thompson, Deputy.

## CLERK'S CERTIFICATE.

THE UNITED STATES OF AMERICA,
WESTERN DISTRICT OF TEXAS, ss.

I, D. H. HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 139 pages, from 1 to 139, inclusive, is a true and correct transcript of proceedings had and orders entered, as therein stated, in cause No. 267 In Equity, styled J. B. SMYTH, W. A. SMITH and UVALDE ROCK ASPHALT COMPANY versus ASPHALT BELT RAILWAY COMPANY, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY and A. R. PONDER, RECEIVER, as the same appear on file and of record in this office.

And I do further certify that the foregoing record embraces only such pleadings, process and orders as are specified in the praecipe agreed to and filed herein by Complainants and Defendants.

WITNESS my official signature and the seal of said District Court, at office in the City of San Antonio, Texas, this the 24th day of September, A. D. 1923.

D. H. HART, Clerk of said Court,

(SEAL) By T. H. THOMPSON, Deputy.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION OF APPELLEES TO DISMISS—Filed October 19th, 1923

Now come the appellees and move the Court to dismiss the appeal herein, and for grounds of such motion respectfully show:

This is an appeal from a final decree of the District Court, rendered after full hearing, in which said Court held that it had no jurisdiction to hear and determine the cause.

Therefore, the appeal should have been directed to the Supreme Court of the United States and not to this Court.

Omitting the formal parts, the decree is as follows:

"Came on to be heard the application for injunction on complainants' original bill and the first and second amendments thereto—leave having been granted to file said second amendment in the interlocutory order entered herein on the 30th day of July, 1923,—and the Court having heard the pleadings, evidence and the argument of counsel is of opinion that the Court is without jurisdiction, and that the defendants' motion to dismiss the bill and the amendments should be and the same is hereby granted.

"It is therefore ordered that said original bill and the two amendments thereto be and the same are hereby dismissed.

"It is further ordered that the complainants pay all costs in this behalf incurred, for which all due process may issue.

"To all of which the complainants in open court at the time duly excepted, and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

"Done at San Antonio, Texas, in open Court, this the 14th day of September, 1923.

Du Val West, Judge."

(Record, pp. 68-69.)

In the memorandum opinion filed by the District Judge he says:

"Upon hearing July 30th, 1923, the suit was dismissed for lack of jurisdiction, and the restraining order dissolved. Plaintiffs were allowed to amend and a further hearing and re-submission of the whole matter was had on August 24th, the defendants again standing on their motion to dismiss. Being a rehearing, the former judgment of dismissal of July 30th should be, and the same is hereby, superseded and set aside." (Record, p. 73.)

Again, in the same opinion, the Court says:

"Defendants' motion to dismiss plaintiffs' second amended bill filed August 24th, 1923, should be, and the same is hereby sustained, and the suit dismissed; the court intending that this order shall operate as a final decree, and to that extent supersede the judgment of dismissal entered herein on July 30th, 1923. An order to this effect will be entered in due course. (Record, p. 82.)

It, therefore, clearly appears that the judgment is a final decree after a full hearing on the whole case, and the Court holding that it was without jurisdiction, the appeal should have been directed to the Supreme Court of the United States.

Slayton vs. City of Jourdanton, (5th Circuit) 268 Fed. 965.
Knisely vs. Burt (5th Circuit) 248 Fed., 493.
United States vs. John, 155 U. S. 109.

Wherefore, appellees respectfully pray that the appeal be dismissed.

(Signed) R. J. Boyle, G. W. Wharton, Mason Williams, Attorneys for Appellees. San Antonio, Texas, October 11, 1923.

Service of a copy of the foregoing motion is hereby admitted.
(Signed) Frank Andrews, Robert H. Kelley, Solicitors for Appellants. Houston, Texas, October 12, 1923.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION FOR INJUNCTION ON BEHALF OF APPELLANTS—Filed October 22nd, 1923

To the Honorable the United States Circuit Court of Appeals for the Fifth Circuit:

Now come J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, Appellants in the above entitled and numbered cause, and respectfully represent:

1. That the construction of the proposed line of railroad referred to in the pleadings contained in the record in this cause has not been abandoned or deferred pending the determination of this cause, but that the construction of said proposed line of railroad has been and is daily being proceeded with. That since the entry by the Court below of its decree of September 14, 1923 (R. 68) three or more miles of track have been laid upon said proposed line and a

right of way therefor has been partially cleared and partially graded over the tract of land involved in this cause.

2. Upon information and belief these Appellants aver that the Appellees are endeavoring to complete the construction of said proposed line of railroad prior to the determination of this cause by this Court, whereupon an injunction to prevent the construction of said proposed line would be futile; and further that unless the Appellees and each of them are restrained in terms as prayed for below from constructing said proposed line of railroad and, as incidental thereto, from prosecuting the condemnation suit now pending in the County Court of Uvalde County, Texas, there is grave danger that by the continuance of the construction program the status of the subject matter of this litigation may be so changed prior to the decision of this Court herein as to defeat the right of these Appellants to an injunction and to render abortive any order which this Honorable Court might otherwise make for the protection of the rights of these Appellants.

In aid of this motion these Appellants here now adopt and reassert all of the allegations of their original Bill of Complaint herein, as amended and supplemented.

These Appellants therefor- respectfully move the Court:

(1) That the Defendants, and each of them, and their and each of their officers, agents, servants, employes and counsel, be restrained until the further order of this Honorable Court from constructing and from undertaking or continuing the construction of said proposed line of railroad in Zavalla and Uvalde Counties in the State of Texas, and from doing or performing any act in aid of the construction thereof, and from further prosecuting or attempting to prosecute that certain proceeding for condemnation instituted by the Defendant Asphalt Belt Railway Company against the Appellants J. B. Smyth, and W. A. Smith and now pending in the County Court of Uvalde County, Texas, unless and until there shall have been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity as provided in paragraph (18) of Section 1 of the Interstate Commerce Act.

(2) That upon the determination of this cause in this Court a writ of interlocutory injunction may issue out of and under the seal of this Honorable Court in like terms restraining the construction of said proposed railroad and the prosecution of said proceeding for condemnation pending the entry of final decree herein upon the merits of the cause.

These Appellants also pray for such other and further orders and for such other and further relief in the premises as to the Court may seem appropriate.

Respectfully submitted, (Signed) Frank Andrews, (Signed) Robert H. Kelley, Solicitors for Appellants.

Affidavit of J. B. Smyth to above paper omitted in printing.

Service of the foregoing motion admitted:
(Signed) R. J. Boyle, John D. Wheeler, G. W. Wharton, Mason Williams, Attys. for Appellees.

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[Title omitted]

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 22nd, 1923

On this day this cause was called, and, after argument by Robert H. Kelley, Esq., for appellants, and J. D. Wheeler, Esq., and Mason Williams, Esq., for appellees, was submitted to the Court.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

OPINION OF THE COURT—Filed October 23rd, 1923

Appeal from the District Court of the United States for the Western District of Texas

Robert H. Kelley, (Frank Andrews and Robert H. Kelley on the Brief), for Appellants.
G. W. Wharton, R. J. Boyle, Mason Williams and J. D. Wheeler for Appellees.

Before Walker and Bryan, Circuit Judges, and Call, District Judge

By the COURT:

This is an appeal from a final decree of the District Court dismissing the amended bill in equity filed by the appellant on the ground that the Court had no jurisdiction to hear and determine the cause.

We understand it to be well settled that such a decree is not appealable to this Court, but is subject to be reviewed by the Supreme Court. Judicial Code, §§128, 238; United States vs. John, 155 U. S. 109; Wagner Electric Mfg. Co. v. Lyndon, U. S. Sup. Ct. Advance Opinions, May 21, 1923; Hoffman v. McClelland, 284 Fed. 837.

Pursuant to the provision of Section 238 (a) of the Judicial Code, enacted September 14, 1922, (42 Stat. 837, Chap. 305), it is ordered that the appeal in this case be transferred to the Supreme Court of the United States at the cost of the appellant.

IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Order Transferring Cause to Supreme Court

Extract from the Minutes of October 23rd, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, it appearing that the appeal in this cause should have been taken to the Supreme Court of the United States, instead of to this Court, in compliance with the Act approved September 14th., 1922, it is now here ordered, adjudged and decreed that the said appeal, be, and the same is hereby, transferred to the Supreme Court of the United States;

It is further ordered, adjudged and decreed that the appellants, J. B. Smyth, et als., and the surety on the appeal bond herein, Southern Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

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UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFCATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 141 to 149 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4214, wherein J. B. Smyth, et als., are appellants, and the Asphalt Belt Railway Company, et als., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 140 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of October, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

Endorsed on cover: File No. 29,931. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 621. J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, appellants, vs. Asphalt Belt Railway Company and A. R. Ponder, receiver, etc. Appeal from the District Court of the United States for the Western District of Texas, transferred from the United States Circuit Court of Appeals for the Fifth Circuit pursuant to the Act of Congress of September 14, 1922. Filed October 29th, 1923. File No. 29,931.

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## FOREWORD.

The body of the following brief was printed for use in the United States Circuit Court of Appeals for the Fifth Circuit, to which an appeal was taken from a decree of the United States District Court for the Western District of Texas, at San Antonio. After the case was submitted in the Circuit Court of Appeals, that Court, conceiving that exclusive jurisdiction of the appeal was vested in the Supreme Court, transferred the case to this Court, by order dated October 23, 1923, in accordance with the Transfer Act of September 14, 1922 (42 Stat. 837).

The appeal has been docketed in this court, and as the same questions are involved here as in the Circuit Court of Appeals, it has been deemed unnecessary to reprint the body of the brief.

With this explanation, the following **statement of the case** will be readily understood.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1923.

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J. B. SMYTH, ET AL.,
Appellants,

vs.

ASPHALT BELT RAILWAY COMPANY, ET AL.,
Appellees.

No. 621.

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## BRIEF FOR APPELLANTS.

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### STATEMENT OF THE CASE.

(*See Foreword on opposite page.*)

This suit was instituted in the District Court of the United States for the Western District of Texas, at San Antonio, by a bill of complaint filed July 23, 1923, by Appellants, J. B. Smyth, W. A. Smith and Uvalde Rock Asphalt Company, a corporation, as Complainants, against the Appellees, Asphalt Belt Railway Company, a corporation, San Antonio, Uvalde & Gulf Railroad Company, a

corporation, and A. R. Ponder, the Receiver of the properties and assets of the said San Antonio, Uvalde & Gulf Railroad Company, as Defendants. (R. 1-24.) Under leave of court an amended bill of complaint was filed July 30, 1923 (R. 38-41), and a second amended and supplemental bill of complaint on August 7, 1923. (R. 47-63.)

The averments of the bill will be set forth in greater detail hereafter. At present it suffices to say that the bill, as amended and supplemented, alleged that the Complainants own a tract of land in Uvalde County in the Western District of Texas; that the Defendants are undertaking to construct a railroad across it, and, in aid of such construction, to condemn a right of way across said tract of land for the purposes of said railroad, as against the individual Complainants, without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act as amended. (41 Statutes 477-478.) A temporary restraining order and interlocutory and perpetual injunctions were prayed for to restrain the construction of the road, including as a part of the construction, the prosecution of the condemnation suit.

On July 28, 1923, the Defendants filed separate answers (R. 24-27, 30), consisting in the main of general denials, admissions that no certificate of public convenience and necessity had been obtained, and statements of fact relied upon to show (a) that the proposed road was not an extension of the line of road of an existing carrier subject to the Interstate Com-

merce Act, and (b) that the proposed road was not, and would not in the future be, subject to said act, and therefore that no certificate from the Interstate Commerce Commission was required for its construction or operation.

On July 30, 1923, a hearing was had on the application for an interlocutory injunction. The Defendants at that time filed a motion to dismiss the bill of complaint, as amended by the first amendment thereto, in which they prayed that the bill as so amended be dismissed for the reasons stated in said motion, as well as in their separate answers. (R. 42.) Upon the hearing, it developed that the proposed line was being constructed under a written contract (R. 86-87), a copy of which was introduced in evidence (R. 111) and referred to in, as it brought about the filing of, the second amended and supplemental bill of complaint (R. 47), in which it was additionally charged that the prosecution of the condemnation suit should be enjoined because, under that contract, its purpose and effect was to appropriate the private property of Appellants to a private rather than to a public use, in violation of Section 17 of Article 1 of the Constitution of the State of Texas, and of the Fourteenth Amendment to the Constitution of the United States.

At the conclusion of the hearing of July 30th, the court entered an order dissolving the temporary restraining order which had been issued upon the filing of the bill, denying the application for a temporary injunction, and subject to Complainants' right to file a second amendment to the bill of complaint within ten days, dismissed the bill as then

amended, for lack of jurisdiction. (R. 45-46.) The second amended and supplemental bill being duly filed, the Complainants renewed their application for a temporary injunction. The Defendants filed another motion to dismiss the bill, as then amended and supplemented (R. 63), and the defendant Asphalt Belt Railway Company, filed an amended answer. (R. 65-68.)

The matter was again heard August 24, 1923, the evidence introduced at the first hearing being re-introduced. On September 14, 1923, the court filed a memorandum opinion (R. 70), and entered a decree dismissing the bill as supplemented and amended. (R. 68-69.) From this decree an appeal has been perfected to this Court by petition therefor and allowance thereof (R. 125), by the filing of assignments of error (R. 127), an appeal bond (R. 133), and a statement of the evidence (R. 83-125). A citation on appeal was duly issued and service thereof admitted (R. 136). The decree is therefore regularly before this Court for review and correction.

## SPECIFICATION OF ERRORS.

The errors specified in the assignment filed in the court below, being those upon which reliance is placed for a reversal of this cause, are the following:

1. In denying and refusing the application of Appellants for an interlocutory injunction as prayed for in their Bill of Complaint on file herein, as amended.

2. In granting and sustaining the motions of Defendants to dismiss Appellants' Bill of Complaint, as amended, and in dismissing the same.

3. In holding and deciding that the District Court of the United States for the Western District of Texas had no jurisdiction of the cause of action set up in Appellants' Bill of Complaint, as amended, and in dismissing the same for lack of jurisdiction.

4. In holding and deciding that the line of railroad proposed to be constructed by the Appellees, and especially by the Appellee Asphalt Belt Railway Company, is not, in truth and in fact, under the undisputed evidence in this case, an extension of the existing line of railroad owned by the Appellee San Antonio, Uvalde & Gulf Railroad Company, and operated in interstate and foreign commerce by the Defendant A. R. Ponder, Receiver of the properties and assets of San Antonio, Uvalde & Gulf Railroad Company.

5. In failing and refusing to hold and decide, under the undisputed evidence in this case, that the existing line of railroad owned by the Defendant San Antonio, Uvalde & Gulf Railroad Company and operated by the Defendant A. R. Ponder, Receiver of the properties and assets of San Antonio, Uvalde & Gulf Railroad Company, is engaged in interstate commerce; that the line proposed to be constructed by Appellees, and especially by the Appellee Asphalt Belt Railway Company, is an extension of said existing line of railroad, and that the construction of said proposed line of railroad can not lawfully be accomplished or carried on but should be enjoined, no certificate of public convenience and necessity relating thereto having been issued by the Interstate Commerce Commission in accordance with the provisions of Section 1 of the Act of Congress known as the Interstate Commerce Act.

6. In holding and deciding that the line of railroad proposed to be constructed by the Appellees, and especially by the Appellee Asphalt Belt Railway Company, is of such character that the failure to procure a certificate of public convenience and necessity for the construction and operation thereof from the Interstate

Commerce Commission under Section 1 of said Interstate Commerce Act, does not render the construction of said proposed line of railroad unlawful and subject to be enjoined under the terms and provisions of Section 1 of said Interstate Commerce Act.

7. In failing and refusing to hold and decide, under the undisputed evidence, that the Appellee Asphalt Belt Railway Company is, within the meaning and intent of the Interstate Commerce Act and of Section 1 thereof, a carrier by railroad subject to said Act and engaged in interstate commerce, as defined in said Act, and, no certificate of public convenience and necessity for the construction or operation of said proposed line of railroad having been obtained from or issued by the Interstate Commerce Commission under Section 1 of said Act, the District Court of the United States for the Western District of Texas, San Antonio Division, in which District and Division the Appellees, and each of them, reside and have their domiciles, and in which said proposed line of railroad is to be constructed, has jurisdiction to, and should by order entered in this cause, enjoin and restrain the construction of said proposed line of railroad, because the same is unlawful and in contravention of the terms, spirit and intent of Section 1 of the Act of Congress known as the Interstate Commerce Act.

8. In failing and refusing to hold, decide and decree that the construction of the line of railroad proposed to be constructed by the Appellees herein, and especially by the Appellee Asphalt Belt Railway Company, is unlawful and in violation of the terms, spirit and intent of Section 1 of the Act of Congress known as the Interstate Commerce Act and should be enjoined and restrained as prayed for in Appellants' Bill of Complaint, as amended.

9. In failing and refusing to hold and decide that the proceeding for condemnation, instituted by the Appellee Asphalt Belt Railway Company, before the

County Judge of Uvalde County, Texas, against Appellants J. B. Smyth and W. A. Smith, and now pending in the County Court of Uvalde County, Texas, is an integral part of the construction of said proposed line of railroad and that the prosecution thereof may and should be enjoined and restrained by the District Court of the United States for the Western District of Texas, San Antonio Division, under the terms and provisions of Section 1 of the Act of Congress known as the Interstate Commerce Act, notwithstanding the terms and provisions of Section 720 of the Revised Statutes of the United States, being Section 265 of the Judicial Code of the United States.

10. In holding and deciding that Section 720 of the Revised Statutes of the United States (Judicial Code, Section 265) forbids the said District Court from enjoining or restraining the prosecution of said condemnation proceeding, now pending in the County Court of Uvalde County, Texas.

11. In holding and deciding that the use to which the private property of Appellants J. B. Smyth and W. A. Smith is sought to be appropriated by the condemnation proceedings now pending against them on the petition of the Appellee Asphalt Belt Railway Company, in the County Court of Uvalde County, Texas, is a public use to which the private property of said Appellants may be appropriated by the exercise of the power of eminent domain without depriving said Appellants, and each of them, of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

12. In failing and refusing to hold and decide that, under the undisputed evidence in this case, the condemnation proceeding instituted by the Appellee Asphalt Belt Railway Company against the Appellants J. B. Smyth and W. A. Smith, and now pending in the County Court of Uvalde County, Texas, will, if prosecuted to effect, deprive said Appellants, and each of

them, of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the property of said Appellants is, by said proceeding, sought to be appropriated to a private and not a public use, and will, if said proceeding be prosecuted to effect, appropriate the private property of said Appellants to the private use of a private corporation, to-wit, Texas Rock Asphalt Company.

13. In holding and deciding that these Appellants, and each of them, are not parties in interest, entitled as such, under the terms and provisions of Section 1 of the Interstate Commerce Act, to have the construction of said proposed line of railroad, and the prosecution of said condemnation proceeding in aid and furtherance thereof, enjoined and restrained, because in violation of Section 1 of said Act.

14. In failing and refusing to hold and decide that the Appellants, and each of them, are parties in interest, entitled as such, under the provisions of Section 1 of the Interstate Commerce Act, to have the construction of said proposed line of railroad, and the prosecution of said condemnation proceeding in aid and furtherance thereof, enjoined and restrained, because in violation of Section 1 of said Act.

15. In holding and deciding that the District Court of the United States for the Western District of Texas is not a court of competent jurisdiction within the meaning and intent of paragraph (20) of Section 1 of the Act of Congress known as the Interstate Commerce Act.

## BRIEF OF THE ARGUMENT.

As a demonstration of the error into which the Court fell in dismissing the bill will assist materially in determining whether the lower court also erred in refusing the temporary injunction prayed for, and as the temporary injunction should clearly have been refused if the motion to dismiss was well taken, we shall consider first the action of the Court in dismissing the bill of complaint, as amended and supplemented.

A consideration of the memorandum opinion filed discloses that the error of the Court in dismissing the bill came about by reason of the fact that he overlooked the well established principle that a motion to dismiss admits, at least for the purposes of the motion, all of the facts well pleaded in the bill of complaint; and that the Court failed to give effect, in his consideration of the motion to dismiss, to the facts pleaded in the bill, and considered only the facts proved at the hearing of the motion for interlocutory injunction. This was plainly error. **United States vs. Railway Employes Department**, 286 Federal 288; **Krouse vs. Brevard Tannin Company**, 249 Federal 538; **Stromberg vs. Holley**, 260 Federal 220.

In **Krouse vs. Brevard Tannin Company**, supra, the Circuit Court of Appeals for the Fourth Circuit, recognizing the fact that a motion to dismiss under Equity Rule 29, serves the purpose and has the effect of a demurrer, said:

> "The Defendant may not, by filing his answer, move to dismiss upon denials of the allegations of the bill, or by new matter set up in his answer. The motion

> must be heard and decided upon the allegations of the bill as upon demurrer. The rule which prevails in courts of equity in disposing of motions to dismiss because the bill does not set up facts sufficient to constitute a cause of action, is to overrule the motion and let the case go to hearing, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing. Rallston Steel Car Company vs. Nat. Dump Car Company, 222 Federal 590."

For the reason just stated, the Court reversed a decree which sustained a motion to dismiss a bill sufficient on its face. See also Hopkins, Ann. Eq. Rules, 3rd Ed., 185-187.

If, therefore, the Bill of Complaint in this case, as amended and supplemented, shows upon its face a good cause of action within the jurisdiction of the District Court of the United States for the Western District of Texas, at San Antonio, the decree in this case, dismissing the bill, must likewise be reversed.

We proceed, therefore, to a consideration of the sufficiency of the allegations contained in the Bill of Complaint as amended and supplemented prior to the hearing of August 24, 1923.

**NO. 1**

THE COMPLAINANTS IN THIS CAUSE, APPELLANTS HERE, ARE "PARTIES IN INTEREST," WITHIN THE INTENDMENT OF PARAGRAPH (20) OF SECTION 1, OF THE INTERSTATE COMMERCE ACT, ENTITLED AS SUCH TO ENJOIN THE CONSTRUCTION OF A RAILROAD COMMENCED OR PROSE-

CUTED IN VIOLATION OF PARAGRAPH (18) OF SECTION 1, OF SAID ACT.

The bill alleged that the Complainants, citizens of the State of Texas, "are parties in interest in this:

> "Complainants J. B. Smyth and W. A. Smith are the owners of the underlying fee simple title to the lands and premises sought to be condemned in the proceeding aforesaid, containing approximately forty-four (44) acres of land in Uvalde County, Texas, and also of other lands on both sides of the right of way so sought to be condemned aggregating about twenty thousand (20,000) acres, all subject, however, to certain rights of their co-Complainant, Uvalde Rock Asphalt Company, acquired by it from time to time for the mining, production and sale from said premises of certain minerals underlying the same, particularly certain valuable deposits of a mineral commonly known as rock asphalt which is a porous or spongy limestone with the interstices partially or wholly filled with a natural asphalt or bitumen, extremely valuable for the construction of pavements, roadways, roofing, flooring and the like.
>
> "That Complainant, Uvalde Rock Asphalt Company, has been engaged for some years last past in mining and producing said mineral deposits from the lands of these Complainants contiguous to said proposed right of way, and in marketing and using the same, and has shipped in the past and now ships and will probably ship in the future for many years to come a large quantity of said rock asphalt, moving the same by railroad through Uvalde and other Counties of the State of Texas and into and through other States; the railroad shipments made by said Complainant during the year last past substantially exceeded one hundred thousand (100,000) tons of said mineral deposit. That said corporate Complainant being a heavy shipper by railroad within the State of Texas and points in other

States is substantially interested not only in the construction of adequate lines of railroad but also in the maintenance of proper rates and of as low a system of railroad rates as will reasonably support the carriers by railroad engaged in the transportation business and is also interested in preventing ill-advised and excessively expensive railroad construction.

"Complainants would further show that the individual Complainants herein are interested in the rock asphalt mined and to be mined by their co-Complainant to the extent of the royalty paid and to be paid them by it at the rate of twenty-five cents (25c) per ton and that all of the Complainants are therefore interested in preventing any of said rock asphalt from being taken by the Defendants herein, or either of them, or any other person or corporation, without just compensation.

"Complainants would further show that said mineral deposit does not occur, so far as they are informed or advised, under all of the lands owned by them as aforesaid, approximating twenty thousand (20,000) acres, but only occasionally and under comparatively small areas. The areas underlaid by said deposit are not uniform in shape or size but are irregular as to both and neither is said deposit uniform in depth or thickness where it occurs, running in depth from practically nothing to twenty (20) feet or more; that said deposit lies almost entirely under the ground being usually covered with a surface coating of earth, stone, rock or other material averaging from eight (8) to forty (40) feet in thickness, between the surface of the ground and the top of the underlying deposit of rock asphalt.

"That so far as your Complainants know or are advised there is only one method of determining with any degree of accuracy the quantity of said mineral deposits underlying any specified tract of land, that being to drill holes below the surface of the ground and to take cores or other particles of the material there-

from, and by the examination and observation of the cores or particles removed from such holes and the depths at which same are found, to determine whether any stratum of said material deposit underlies the point at which said hole is drilled and if so the thickness of the same and the distance thereof from the surface of the ground; and by drilling successive holes, at intervals, to compute the yardage or tonnage of said deposit underlying the specified tract of land involved. That any investigation conducted as aforesaid is extremely expensive in that the average cost of drilling such test holes is the sum of, to-wit: Fifty Dollars ($50.00) each, and in order to make a substantially accurate computation of all strata of said deposit encountered under the proposed right of way of the Defendants herein would require the drilling of not less than two hundred (200) of such test holes at an aggregate cost of not less than, to-wit, Ten Thousand Dollars ($10,000.00).

"Complainants would further show that the only reasonably economical method of mining said mineral deposit so far known to the art is the process commonly known as "strip mining," by which the surface covering of earth, stone and the like, superimposed upon said mineral deposit, is stripped or removed from the same by blasting, steam and hand-shovels and the like and by then blasting and otherwise removing the deposit, from its natural position, without the use of tunnels, shoring or sub-surface digging.

"That said substance is so hard and compact that heavy blasting charges are required to break the same up into pieces convenient for handling and use and that the said blasting process when so carried on in the open air is inherently dangerous to persons and property in the vicinity thereof on account of the showers of rock, stone and other hard substances thrown into the air with great violence and for great distances by the force of such blasts and thus caused to be dropped upon and thrown against the surrounding territory, to the danger and probable damage of all persons and

property in the vicinity of such operations. By reason of the necessity of mining said mineral deposit by the method aforesaid it would be practically impossible to conduct any such mining operations within a distance of, to-wit, five hundred (500) feet from any standard railroad track except at large expense, including liability for damages to said track and to the persons, equipment and traffic moving thereover, or for insurance premiums to cover such liability; and your Complainants therefore aver that if the proposed right of way of the Defendants herein crosses or passes over any of the deposits of said mineral underlying their said lands, the natural and necessary effect of the condemnation thereof for railroad purposes would be to prevent Complainants from mining, producing and selling, not only the deposit lying immediately underneath said right of way, but also all such deposits lying within five hundred (500) feet of said right of way on either side thereof, and that the expense of test drilling or exploring a belt of land one thousand (1000) feet or more in width, being five hundred (500) feet on each side of the center line of said proposed right of way, would be proportionately greater than that required, as above alleged, to explore the strata under the proposed right of way alone, and would cost, in the opinion of Complainants, not less than One Hundred Thousand Dollars ($100,000.00).

"Complainants are informed and believe, and upon information and belief allege, that the right of way sought to be condemned in said proceeding by the Defendant Asphalt Belt Railway Company does in fact cover and overlie a considerable quantity of said mineral deposit, in which Complainants are interested as aforesaid, and unless the hearing and further prosecution of said condemnation proceeding, set as aforesaid for the 31st day of July next, is in some manner restrained and enjoined, your Complainants will be obliged either to expend enormous sums of money, as aforesaid, for the purpose of determining what dam-

ages they will suffer as a result of such condemnation, if allowed, or to prove only nominal damages where the actual damages will be excessive. And in this connection Complainants allege, upon information and belief, that a careful and skillful examination, by the methods above described, of the deposits underlying said proposed right of way, would show the damages of these Complainants, by virtue of the condenmation of said proposed right of way, to be in excess of the sum of Five Hundred Thousand Dollars ($500,000.00).

"Complainants further allege that the cost and expense to them of so exploring below the surface of the land comprehended in the right of way sought to be condemned in the proceeding above referred to may not, according to the information and belief of your petitioners, be recovered by them, or either of them, in said condemnation proceeding, or in any other suit or action as any part of the damages sustained by them in connection with the condemnation of said right of way. That, therefore, unless said unlawful condemnation proceeding shall be enjoined and restrained in advance of the hearing thereof before said Commissioners, your Complainants, by virtue of the premises, will sustain irreparable damage and injury." (R. 11-16.)

The bill further alleges:

"That the Defendants propose, and have undertaken to construct, maintain and operate the line of the Asphalt Belt Railway Company, from a point on the rails of the Defendant San Antonio, Uvalde & Gulf Railroad Company, at or near the station of Pulliam in Zavalla County, Texas; thence in a northwesterly direction a distance of about twenty (20) miles through Zavalla and Uvalde Counties in said State of Texas to a point in Uvalde County at or near the mines of the Texas Rock Asphalt Company about thirty (30) miles more or less west of said City of Uvalde. * * *

"That in pursuance of their said proposal and undertaking to construct said line of railroad in Zavalla

and Uvalde Counties, the Defendant Asphalt Belt Railway Company, at the instance and upon the demand of its co-Defendants herein, has heretofore presented to the County Judge of Uvalde County, Texas, its petition for the condemnation of certain lands more particularly described in said petition, a copy of which, marked Exhibit 'A' is hereto attached and hereby referred to and made a part hereof, for right of way and other railroad purposes for the line of railroad so undertaken to be constructed, and has caused the said County Judge to appoint Commissioners, as provided by the laws of the State of Texas, to assess the damages which will accrue to the Defendants named therein in case of such condemnation. Complainants further show that said Commissioners have caused the Defendants in said condemnation proceeding, to-wit: Complainants herein J. B. Smyth and W. A. Smith, to be served with notice of hearing upon the question of such damages and have set said matter for hearing before them, the said Commissioners, in the City of Uvalde, Texas, on the 31st day of July, 1923, at which time the Defendants herein, unless restrained, will insist, according to the best of Complainants' information and belief, upon the hearing and determination of said matter by said Commissioners." (R. 5-6.)

In paragraph 3 of the Second Amended and Supplemental Bill of Complaint (R. 52) it was further alleged that:

"* * * Since the hearing of their motion for preliminary injunction on the 30th day of July, 1923, the Commissioners appointed in said condemnation cause have held a hearing and have entered their award of condemnation to which these Complainants J. B. Smyth and W. A. Smith have duly filed exceptions as provided by the laws of the State of Texas, and that under such laws said proceeding is now pending in the County Court of Uvalde County, Texas, and will, unless restrained, be set down for trial at the ensuing term of said Court, which commences on, to-wit, the 17th day of September, 1923."

The question immediately arises, therefore, whether parties in the situation of the Complainants, as shown by the averments of the bill of complaint above set forth, are interested in the construction of the proposed railroad. The ordinary conclusions of common reason are re-enforced not only by the conclusion of the court below, who, judging by the opinion filed, clearly considered the Complainants entitled to sue for an injunction under Paragraph (20) of Section 1 of the Act, but also by the decision of the District Court of the United States for the Eastern District of Michigan, in **Detroit & M. Ry. Co. vs. Boyne City, Etc., R. R. Co.,** 286 Fed. 540, in which this precise question was determined. The opinion referred to was handed down in two suits. In one of them the Complainant was a competing railroad. In the other the Complainant was a landowner whose property was to be crossed by the proposed track. The Court said:

> "I am of the opinion that the Plaintiff in each of these suits is 'a party in interest' within the meaning of paragraph (20) of said Section, and as such entitled to the relief prayed."

## II.

## THE COURT BELOW HAD JURISDICTION OF THE CAUSE OF ACTION SET UP IN THE BILL OF COMPLAINT AS SUPPLEMENTED AND AMENDED.

Paragraph (18) of Section 1 of the Interstate Commerce Act reads in part as follows:

> "After ninety days after this paragreph takes effect, no carrier by railroad, subject to this act, shall undertake the extension of its line of railroad, or the con-

> struction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act, over, or by means of, such additional or extended lines of railroads, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require, the construction, or operation, or construction and operation, of such additional or extended lines of railroad. * * *"

Paragraph (20) of the same Section reads in part as follows:

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of road, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after the issuance of such certificate, and not before, the carrier by railroad, may, without securing approval other than such certificate, comply with the terms and conditions contained in, or attached to the issuance of such certificate, and proceed with the construction, operation or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph, or of Paragraph (18) or (19) of this section, may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party at interest. * * *" (41 Stat. 477,478.)

Regarding as settled the proposition that the Appellants are "parties in interest," entitled as such to bring a suit of this character, we next inquire whether the court below was a "court of competent jurisdiction."

The Bill of Complaint alleged that the Complainants were all citizens of the State of Texas, two of them being residents and inhabitants of the County of Jefferson in the Eastern District, and the other of the County of Bexar, in the Western District; that the Defendants were each and all citizens, residents and inhabitants of the County of Bexar in the San Antonio Division of the Western District of the State of Texas; also

> "That this suit is one arising under the Constitution and Laws of the United States and particularly under an Act of Congress entitled 'An Act to regulate commerce,' approved February 4, 1887, as amended by an Act of Congress entitled 'An Act to provide for the termination of Federal control of Railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employes; to further amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, as amended, and for other purposes,' approved February 28, 1920; and involves a sum and value in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs." (R. 2.)

The simple question in this connection, therefore, is whether the District Court of the United States for the Western District of Texas, at San Antonio, has jurisdiction of a cause of action asserted against citizens, residents and inhabitants of that District and Division, arising under the Constitution and Laws of the United States, and particularly under the Interstate Commerce Act, and involving more than Three Thousand Dollars exclusive of interest and costs.

Under Subdivision 1 of Section 24 of the Judicial Code, as amended, the District Courts have original jurisdiction

> "Of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum of value of Three Thousand Dollars ($3,000.00), and (a) arises under the Constitution or Laws of the United States. * * * Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." (36 Statutes 1091; U. S. Compiled Statutes 1918, Compact Ed., Sec. 991.)

Under Subdivision 8 of the same section of the Judicial Code (36 Statutes 1092), the District Courts are given jurisdiction:

> "Of all suits and proceedings arising under any law regulating commerce except those suits and proceedings, exclusive jurisdiction of which has been conferred upon the Commerce Court."

This exception of cases originally committed to the jurisdiction of the Commerce Court was repealed by the Act of October 22, 1913 (38 Statutes 219), whereby the Commerce Court was abolished, and the jurisdiction vested in the Commerce Court was transferred to and vested in the District Courts.

From Section 108 of the Judicial Code (36 Statutes 1125, U. S. Compiled Statutes 1918, Compact Edition, Section 1095), it appears that the residence of the Defendants, Bexar County, is within the San Antonio Division of the Western District of Texas.

By Section 52 of the Judicial Code (36 Statutes 1101, U. S. Compiled Statutes 1918, Compact Ed., Sec. 1034), it is provided that:

> "When a state contains more than one district, every suit not of a local nature in the District Court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants residing in different districts of the state, it may be brought in either of the districts. * * *"

The following section of the Code provides that where there are several divisions in a district, every suit not of a local nature must be brought in the division where the defendants, or some one or more of them, reside.

From this it would seem obvious that the court below was competent to hear and entertain the cause of action asserted in the bill as amended and supplemented.

In addition to the plain language of the jurisdictional statutes, it is not amiss to remark that if the court below had no jurisdiction of this cause of action, Congress has indeed been guilty of a most egregious enactment. Paragraph (20) of Section 1 of the Interstate Commerce Act plainly provides for an injunction to issue out of a court of competent jurisdiction to restrain any construction in violation of the terms of paragraphs (18), (19) or (20). Obviously the only courts competent to issue injunctions, aside from the Federal Courts, are the courts of the State. If it was not intended that the Federal Courts should enforce the Federal laws, and if it was intended that suitors relying solely upon an Act of Congress should be committed for their remedy to the courts of the several States, then Congress, in this instance, has certainly not followed its customary practice.

## III.

## THE BILL AS AMENDED AND SUPPLEMENTED, STATES A GOOD CASE FOR THE INJUNCTION PROVIDED FOR IN PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

In addition to the above quoted allegations of citizenship, residence, interest of the Complainants, and amount in controversy, and as to the fact that the suit is one arising under the Constitution and Laws of the United States, and as to the proposal and undertaking of the Defendants to construct a line of railroad, the following averments appeared in the bill:

> "Complainants aver that the Defendant San Antonio, Uvalde & Gulf Railroad Company owns, and the Defendant Receiver operates, a line of standard gauge railroad extending from the City of San Antonio, Bexar County, Texas, to the City of Corpus Christi, Nueces County, Texas, with another line branching off from the San Antonio-Corpus Christi line at or near the town of North Pleasanton, Atascosa County, Texas, and running thence through the Counties of Atascosa, McMullen, LaSalle, Dimmit, Zavalla and Uvalde to the City of Uvalde in said last named County, with another branch line running south from Crystal City, Zavalla County, Texas, to Carrizo Springs, Dimmit County, Texas. That both of said Defendants last named are common carriers by railroad, subject to the Interstate Commerce Act, being the said Act of Congress approved February 4, 1887, as amended, and have been such common carriers by railroad, subject to said Act, since a date long prior to the occurrence of the matters and things herein alleged.
>
> "That the Defendant Asphalt Belt Railway Company was created by the filing with the Secretary of State of

the State of Texas on the 9th day of June, A. D., 1923, of certain articles of incorporation, as provided by the laws of the State of Texas relating to the creation of railroad corporations. Upon information and belief Complainants aver that said last named Defendant was brought into existence at the instance of its co-Defendants; that its said co-Defendants supplied all funds and property used for the payment of its capital stock and that the Defendant Asphalt Belt Railway Company is entirely controlled and absolutely dominated in every respect by its co-Defendants herein, and is in fact their subservient creature, and is by them considered and treated and will be considered and treated as a mere division of the railroad owned and operated by them as aforesaid, and is their mere subsidiary corporation." (R. 4-5.)

"That the Defendants propose, and have undertaken to construct, maintain and operate the line of the Asphalt Belt Railway Company, from a point on the rails of the Defendant San Antonio, Uvalde & Gulf Railroad Company, at or near the station of Pulliam in Zavalla County, Texas; thence in a northwesterly direction a distance of about twenty (20) miles through Zavalla and Uvalde Counties in said State of Texas to a point in Uvalde County at or near the mines of the Texas Rock Asphalt Company about thirty (30) miles more or less west of said City of Uvalde. That the construction of said line of railroad to be owned by the Defendant Asphalt Belt Railway Company will in truth and in fact and to all intents and purposes amount to and be an extension of the existing line of railroad owned and operated as aforesaid by the Defendant San Antonio, Uvalde & Gulf Railroad Company and its Receiver.

"That in pursuance of their said proposal and undertaking to construct said line of railroad in Zavalla and Uvalde Counties, the Defendant Asphalt Belt Railway Company, at the instance and upon the demand of its co-Defendants herein, has heretofore presented to the

County Judge of Uvalde County, Texas, its petition for the condemnation of certain lands more particularly described in said petition, a copy of which, marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof, for right of way and other railroad purposes for the line of railroad so undertaken to be constructed, and has caused the said County Judge to appoint Commissioners, as provided by the laws of the State of Texas, to assess the damages which will accrue to the Defendants named therein in case of such condemnation. Complainants further show that said Commissioners have caused the Defendants in said condemnation proceeding, to-wit: Complainants herein J. B. Smyth and W. A. Smith, to be served with notice of hearing upon the question of such damages and have set said matter for hearing before them, the said Commissioners, in the City of Uvalde, Texas, on the 31st day of July, 1923, at which time the Defendants herein, unless restrained, will insist, according to the best of Complainants' information and belief, upon the hearing and determination of said matter by said Commissioners.

"Complainants further allege, upon information and belief, that the Defendants herein have not applied, nor has either of them applied to the Interstate Commerce Commission to secure, and that neither has secured from said Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such proposed line of railroad notwithstanding the requirements in that respect of Section 1 of said Interstate Commerce Act.

"Upon information and belief Complainants further aver that even if said proposed line of railroad be not in truth and in fact an extension of the existing line of road of the San Antonio, Uvalde & Gulf Railroad Company, the Defendants intend to operate the same as a standard gauge railroad, and as a common carrier for

hire engaged in the movement and carriage of passengers and freight in interstate and foreign commerce as defined in the said Interstate Commerce Act, and intend to and will, unless restrained, subject the same, if it be not already subjected, as a common carrier by railroad, to all of the terms and provisions of the said Interstate Commerce Act, and that the Defendants herein would not nor would either of them undertake to construct, maintain or operate said line of railroad if the traffic to be moved and handled thereon were to consist solely of passengers and freight moving solely and wholly between points within the State of Texas.

"Complainants, upon information and belief, further aver that the principal purposes and objects actuating the Defendants San Antonio, Uvalde & Gulf Railroad Company and A. R. Ponder, Receiver thereof, in the creation of the Asphalt Belt Railway Company, were to create a corporation subsidiary to the San Antonio, Uvalde & Gulf Railroad Company. That said subsidiary corporation is to be controlled and dominated by said Railroad Company and owned and operated in common interest and for a common purpose and for the benefit of said Railroad Company; and in all practical and substantial respects and in legal effect and purposes is an extension of the road of said San Antonio, Uvalde & Gulf Railroad Company within the meaning of Section 1 of the Interstate Commerce Act. That the practical and legal effect of such conduct on the part of the Defendants, if permitted, is and will be that the San Antonio, Uvalde & Gulf Railroad Company, a carrier subject to the Interstate Commerce Act, will have undertaken and will have effected the extension of its line of railroad and the construction of a new line of railroad, without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such new or extended line of railroad.

"Complainants aver that the effort to construct said line of railroad in the name and title and as the property of Asphalt Belt Railway Company is a simple and obvious subterfuge. That if said Asphalt Belt Railway Company should be held to be a common carrier not subject to the Interstate Commerce Act, because only recently created, and not owning or operating any line of railroad engaged in interstate commerce, and that for that reason it might construct the proposed line of railroad without making itself subject to the Interstate Commerce Act, and without obtaining a certificate of convenience and necessity therefor from the Interstate Commerce Commission, the whole force and power of the Interstate Commerce Commission's authorty to prevent construction would be destroyed; for that if the construction of this or any other twenty miles of railroad is permitted it will, when completed and put in operation, be compelled to handle interstate and foreign commerce by the necessities and for the convenience of the communities which it serves and therefore the Interstate Commerce Commission will have imposed upon it the necessity of determining, after construction and after large expenditures of money have been made and after the people in the various communities served by such railroads are asking for interstate service along with the state service, whether or not such railroad shall be permitted to operate in interstate commerce by its owner, when both the letter and the spirt of the law, paragraph (18) of Section 1 of the Interstate Commerce Act as amended, require that all these questions shall be determined before and not after the construction has been accomplished. The spirit and purpose of the law is to prevent the expenditure prior to obtaining permission, if not approved by the Commission, and not to permit the Commission to be embarrassed by determining the questin after the construction has been completed and expenditures have been made.

"Your Complainants aver that their property can be taken only for public use; that the use claimed in this case is for the uses of a railroad company incorporated under the laws of the State of Texas. The Constitution of the State of Texas, Section 1, Article 10, declares that:

" 'Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared public highways and railroad companies, common carriers,' and Complainants aver that under the provisions of the Texas Constitution every railroad constructed after the adoption thereof automatically is, becomes and remains, a public highway, and every railroad company a common carrier and it may not legally refuse to accept and transport any traffic which may be offered to it regardless of the point of origin and destination from or to which such traffic may move. Complainants also allege that the effort to condemn the property of Complainants J. B. Smyth and W. A. Smith in advance of the issuance of such a certificate, for an alleged public use, through the incorporation of a railroad company, because of and by virtue of the fact that it does not presently own or operate a railroad and is not presently engaged in interstate commerce, is a manifest effort to evade the plain and binding provisions of the Laws of the United States which prohibit the construction or the operation of a common carrier railroad engaged in interstate commerce without first obtaining a certificate of necessity and convenience as required by the aforesaid Interstate Commerce Act. That the contemplated extension is forbidden and prohibited by the laws of the United States and that the effort on the part of Defendants to condemn for a so-called public use is not only without warrant of law but is in direct violation of the laws of the United States which expressly prohibit the Defendant from making or undertaking any such extension. Accordingly, Complainants aver that the effort on the part of Defendants to condemn said property is wholly without

authority, is void and is in violation of the laws of the United States and is a trespass upon the property of said Complainants against which Complainants have no legal, adequate, certain or sufficient remedy at law.

"That by virtue of the premises the Defendants and each of them, have violated and are threatening a further and continuous violation of the terms and provisions of Section 1 of said Interstate Commerce Act, and particularly of Paragraph (18) of said Section, notwithstanding the pains and penalties provided in Paragraph (20) of said Section, in that the Defendants have undertaken the extension of the existing line of railroad of the Defendant San Antonio, Uvalde & Gulf Railroad Company and are intending and threatening to engage in transportation under said Interstate Commerce Act over and by means of such new and extended line of railroad without first having applied for or obtained from the Interstate Commerce Commission a certificate as aforesaid and as required by Section 1 of said Act." (R. 5-11.)

"Complainants further allege that they have no complete or adequate remedy at law and that the only remedy open to them by which they may avoid suffering such irreparable damage and injury is the writ of prohibitory injunction which this Court is competent under the circumstances to issue." (R. 16.)

Omitting the formal parts, the First Amended Bill of Complaint was as follows:

"If Complainants should be mistaken with respect to the matters alleged upon information and belief in Paragraph 4 of their original Bill of Complaint herein, then, in the alternative, they allege upon information and belief that subsequent to the appointment and qualification of the Defendant Ponder, as Receiver of the properties and assets of the Defendant, San Antonio, Uvalde & Gulf Railroad Company, and prior to the incorporation of the Defendant, Asphalt Belt Rail-

way Company, substantially all of the outstanding securities of said Railway Company, stocks and bonds, were acquired by Frank Kell, Esq., of Wichita County, Texas, W. T. Eldridge, Esq., of Fort Bend County, Texas, and the said A. R. Ponder, and said individuals have ever since held and owned such securities and now hold and own the same and control and dominate the policies relating to the operation and management of the railroad of the Defendant San Antonio, Uvalde & Gulf Railroad Company; that they have worked out a plan of reorganization affecting said line of railroad, by which said line of railroad and its appurtenances will be acquired by another railroad company created for that purpose; that in pursuance of said general plan the said Kell, Eldridge and Ponder also caused the incorporation of Defendant Asphalt Belt Railway Company and own or have agreed to own the securities thereof, as issued, in the same proportions that they respectively own the outstanding securities of the Defendant San Antonio, Uvalde & Gulf Railroad Company and that it has been and is their intention and purpose to cause the construction, maintenance and operation of the line of railroad of the Defendant Asphalt Belt Railway Company to be accomplished and conducted as a mere branch, division or extension of the existing railroad now operated by Defendant Ponder, Receiver, and to cause the Defendant Asphalt Belt Railway Company to be and remain a mere subsidiary of the corporation which has been projected as the future owner of the existing properties of the Defendant San Antonio, Uvalde & Gulf Railroad Company, with the stock and other securities of such subsidiary to be held and owned either directly by the parent corporation or by trustees for the use and benefit of the parent corporation and the stockholders thereof. Further, that the intention and purpose of the Defendants and of the said Kell, Eldridge and Ponder is that said existing railroad and said proposed railroad shall be owned by substantially the same parties, operated under a common management and control and for

a common purpose and in the advancement of a common interest.

"Complainants further allege upon information and belief that the condemnation proceeding referred to in Paragraph 5 of their original Bill of Complaint herein was instituted by the Defendant Asphalt Belt Railway Company and unless restrained will be pressed and prosecuted by it in pursuance of the plan and in aid of the purposes above referred to; that the same constitutes a substantial part of the undertaking to construct the line of road proposed to be constructed by the Defendant Asphalt Belt Railway Company and is in violation of Paragraph 18 of Section 1 of the Interstate Commerce Act by reason of the facts alleged herein and in said original Bill of Complaint." (R. 38.)

In the Second Amended and Supplemental Bill of Complaint, it was also alleged that:

"These Complainants would further show by way of supplement to their original Bill of Complaint herein that since the hearing of their motion for preliminary injunction on the 30th day of July, 1923, the Commissioners appointed in said condemnation cause have held a hearing and have entered their award of condemnation to which these Complainants J. B. Smyth and W. A. Smith have duly filed exceptions as provided by the laws of the State of Texas, and that under such laws said proceeding is now pending in the County Court of Uvalde County, Texas, and will, unless restrained, be set down for trial at the ensuing term of said Court, which commences on, to-wit, the 17th day of September, 1923.

"These Complainants would further show in answer to the allegations of the Defendants herein to the effect that it is the intention of the Defendant Asphalt Belt Railway Company to confine itself to the carriage, movement and handling of intra-state traffic moving wholly within the State of Texas; that said Defendant

may not under the laws of the State of Texas and particularly under Articles 6588, 6608 and 6610 of the Revised Statutes of Texas of 1911, so limit or confine the operation of said line of railroad or the obligations of said railroad company to the public. That under the laws of the State of Texas every railroad company created under such laws is obliged upon demand to transport, carry and handle interstate commerce as defined in the Interstate Commerce Act. Upon information and belief these Complainants allege that as soon as said railroad is completed, if at all, demand will be made upon it from time to time for movement by it of inter-state and foreign commerce and that such commerce will be moved, transported and handled by said Defendant over its said line of railroad." (R. 52, 53.)

In order to test the sufficiency of these allegations of the bill, let us turn back to the statute to determine what consitutes a violation of it.

In the first place, it is an inhibition against action by "a carrier by railroad subject to this Act." That the Defendants are carriers by railroad is beyond question. The two corporate defendants are both alleged to have been created under the laws of the State of Texas.

Section 1 of Article 10 of the Constitution of Texas declares that "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers."

The Defendant Receiver has admitted (R. 110) that he is a common carrier by railroad, subject to the Act. Are the corporate Defendants then subject to the Act?

Section 1 of the Act begins as follows:

> "That the provisions of this Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * * from one state * * * to any other state or territory of the United States * * *."

In the bill it was alleged that the Defendant San Antonio, Uvalde & Gulf Railroad Company and its Receiver "are common carriers by railroad, subject to the Interstate Commerce Act." (R. 4.)

It was also alleged that the Defendant Asphalt Belt Railway Company "was brought into existence at the instance of its co-Defendants; that its co-Defendants supplied all funds and property used for the payment of its capital, and that the Defendant Asphalt Belt Railway Company is entirely controlled and absolutely dominated in every respect by its co-Defendants herein, and is in fact their subservient creature, and is by them considered and treated, and will be considered and treated, as a mere division of the railroad owned and operated by them as aforesaid, and is their mere subsidiary corporation." (R. 5.)

It was further alleged (R. 5) that the construction of the line of railroad to be owned by the Defendant Asphalt Belt Railway Company will in truth and in fact be a mere extension of the existing line of railroad owned and operated by its co-Defendants; and, upon information and belief, that even if the proposed line be not in fact an extension of the existing line of its co-Defendants, the Defend-

only intend to operate the same as a standard gauge railroad and as a common carrier for hire, "engaged in the movement and carriage of passengers and freight in interstate and foreign commerce, as defined in said Interstate Commerce Act, and intend to and will, unless restrained, subject the same, if it be not already subjected, as a common carrier by railroad, to all of the terms and provisions of said Interstate Commerce Act, and that the Defendants herein would not, nor would either of them, undertake to construct, maintain, or operate said line of railroad if the traffic to be moved or handled thereon were to consist solely of passengers and freight moving solely and wholly between points within the State of Texas." (R. 7.)

It was further alleged that the effort to construct said line in the name and title and as the property of the Defendant Asphalt Belt Company is a simple and obvious subterfuge; that if said company should be held not to be subject to the Act because only recently created and not operating any railroad engaged in interstate commerce, the whole power of the Commission to prevent construction would be destroyed, for that, when the construction is completed and the road is put in operation, it will be compelled to handle interstate and foreign commerce, and the Commission will then be compelled to determine, after the expenditure is made, whether it will permit the road to be operated in interstate commerce, when both the letter and the spirit of the law require that these questions shall be determined before, and not after, the construction has been accomplished.

It was also alleged that the Defendants, and each of them, are intending and threatening to engage in transportation, under the Interstate Commerce Act, over and by means of such new line, without first having obtained the necessary certificate. (R. 7-11.)

And in the Second Amended and Supplemental Bill of Complaint it was further alleged that it is not the intention of the Defendant Asphalt Belt Company to confine itself to intrastate traffic; that said Defendant may not under the laws of Texas so limit or confine its operations, but that under such laws every railroad company created in pursuance thereof is obliged to handle interstate commerce, as defined in the Act.

"Upon information and belief these Complainants allege that as soon as said railroad is completed, if at all, demand will be made upon it, from time to time, for movement by it of interstate and foreign commerce, and that such commerce will be moved, transported, and handled by Defendant over its said line of railroad. (R. 52, 53.)

The Appellees claim, however, that the Defendant Asphalt Belt Company is not a carrier subject to the Act, because it is not at the present time "engaged in interstate commerce." The thought is that it can not be subject to the Act until it has a piece of railroad completed, over which trains are moving, nor until interstate freight or passengers are actually being hauled on those trains. That such a claim can not be sustained, can be easily demonstrated.

Paragraph (7) of Section 6 of the Interstate Commerce Act reads, in part, as follows:

> "No carrier unless otherwise provided by this act shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act * * *"

A heavy penalty is prescribed for a violation of this prohibition. Therefore, the laws of the United States prohibit the Defendant Railway Company, or any other carrier, from moving interstate commerce without first filing tariffs, applicable to such movement, with the Interstate Commerce Commission. However, when we inquire into the process of filing tariffs with the Interstate Commerce Commission we find that the only provision of law authorizing the filing of such tariffs is contained in paragraph (1), which begins as follows:

> "That every common carrier, **subject to the provisions of this Act**, shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points * * *"

The only carrier, therefore, which has the right under the law to file tariffs with the Interstate Commerce Commission is **a carrier subject to the act.** If a carrier may not be subject to the act until it has constructed a railroad and actually moved interstate commerce, then the only way in which a railroad, built after the passage of this Act, can become subject to it, and observe its directions, is to begin

by violating the law. In other words, it may not move interstate commerce without filing tariffs, but according to the construction with the Defendants seek to place on the Act it may not file tariffs until it has first moved interstate commerce, because only thus can it become subject to the Act and only after it is subject to the act has it the right to file tariffs. Counsel would therefore have the Court believe that Congress has foolishly provided that no railroad constructed after the passage of the provisions just quoted can become an interstate carrier, within the meaning of the Act, until, in violation of the Act, it hauls some interstate commerce without any tariffs on file. Then, according to the contention of counsel, it may present itself before the Interstate Commerce Commission and, by reason of its disclosure that it has violated the law under which the Commission acts, entitle itself to file tariffs with the Commission and to be regulated by the Commission and to haul more interstate commerce without any violation of law.

Such an absurd conclusion can be entirely avoided by giving to the phrase "common carrier subject to this Act" as used in paragraph (1) of Section 6, the same meaning which that expression must plainly have under paragraph (18) of Section 1 in order to avoid a practical nullification of the provision last mentioned. That is, concede freely, as reason dictates, that Congress intended to enact a workable law, and then construe the law liberally and fairly in order to accomplish the legislative purpose. All that need be done to this end is to recognize the fact that a carrier corporation does not need to have any railroad in existence

and does not need to move a single car over any railroad in order to become subject to the Interstate Commerce Act. If it be a **potential** carrier of interstate commerce, if it have the statutory obligation, as this corporation has, to handle and transport interstate commerce, whether or not it has the desire of handling such commerce, then we assert that it is subject to the act; that it will not be heard to deny its charter obligations, and that it must comply with the provisions of law relating to carriers of interstate commerce by railroad or abide the consequences.

An administrative ruling by a Government Department, long adhered to, is given great weight by the Courts in determining the proper interpretation to be placed upon a statute. The Supreme Court of Texas and the Supreme Court of the United States are in accord upon this proposition:

In **Kern River Company** vs. **U. S.**, 257 U. S. 147, 66 L. Ed., 175, 179, Mr. Justice Van Devanter, speaking for the Court, said:

> "Even if the meaning of a Federal Statute were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it." Citing Logan vs. Davis, 233 U. S. 613, 58 L. Ed. 1121, 1128, in which the Court referred to: "The settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons."

In **Fielder vs. Houston Oil Company of Texas**, 208 S W. 158, Judge Montgomery, speaking for the Commission of Appeals, said:

> "We think this practical construction by the proper authorities of the Act of December 14, 1863, is entitled to great weight."

In **Moorman vs. Terrell**, 202 S. W. 727, Mr. Justice Greenwood, speaking for the Supreme Court, said:

> "Sound public policy requires the solving of mere doubts in favor of the construction put upon laws by the departments and officers charged with their administration."

In this connection we call the attention of the Court to the construction placed by the Interstate Commerce Commission upon the term "a carrier by railroad subject to the Act" as used in the above quoted provision of Section 6 relating to the filing of tariffs. The Commission has never required a violation of paragraph (7) of Section 6 as a condition precedent to the filing of tariffs under paragraph (1) of the same section. Rule 57 of the Interstate Commerce Commission's Tariff Circular No. 18A, entitled "Regulations to govern the construction and filing of freight tariffs and classifications and passenger fares and schedules," containing administrative rulings of the Commission, revised by order of the Commission, approved February 13, 1911, and effective March 31, 1911, reads as follows:

> "**New Roads.**—On newly constructed lines of road, including branches and extensions of existing roads, local rates and fares, and also joint rates and fares, may be established in the first instance to and from points on such new lines by posting tariffs of such rates

or fares issued by the carrier owning or operating such newly constructed lines or by joint agents acting for it under power of attorney FXI or PXI, and filing the same with the Commission one day in advance. Such tariff must bear notation that it applies to or from points on newly constructed lines to or from which no rates or fares from same points of origin or to same points of destination have applied, and give reference to this rule. Tariffs or supplements to tariffs issued by other carriers establishing rates to or from or via only such newly constructed line may be issued upon statutory notice or special permission for shorter time. It will be the Commission's policy to grant such reasonable permissions as are necessary to give carriers and shippers fullest efficiency of such new lines."

Rule 65 of the same circular reads as follows:

"65. **Classification of High Explosives** (Issued May 29, 1907),—Some freight classifications provide that high explosives will be 'taken only by special agreement.' Carriers are prohibited from carrying any traffic except under tariffs provided in the manner prescribed by law. It follows, therefore, that no traffic or transportation can be the subject of special agreement between carrier and shipper except as provided in section 22 of the Act. If it is impracticable to classify high explosives in the classification the statement must not be, 'taken only by special agreement,' but must be, 'subject to regulations and rates in tariffs of the individual carrier'; and each carrier must provide in its tariff the rates and regulations applicable to such traffic. (See Rule 4 (h).)"

The rule last quoted was issued May 29, 1907, and contains the plain statement, never departed from by the Commission, that carriers are prohibited from carrying any traffic except under tariffs filed in the manner prescribed by law. Rule 57 makes it plain that the Commission will

receive and file tariffs showing rates to and from points on newly constructed lines of road without any condition that such road must previously have been engaged in carrying interstate commerce. This is a construction by the Interstate Commerce Commission, which is plainly charged with the duty of enforcing the Interstate Commerce Act, to the effect that a carrier railroad may be subject to the Act to Regulate Commerce without ever having carried, moved or transported a single interstate passenger or a single pound of interstate freight. No record can be found of any instance in which the Interstate Commerce Commission has ever insisted that a new road must first haul interstate commerce in violation of law before it can become subject to the Act. That has not been the practice of the Commission. The well known practice is for new roads to file their tariffs with the Commission at any time before they are opened for operation. The Commission has always filed such tariffs without objection and treated the carrier filing them as subject to the law.

The purpose of Congress in enacting this paragraph of the law was obviously to prevent the construction of lines or parcels of railroad not needed for the service of the public or which might become a burden upon the National system of railways by reason of their inability to support themselves, thus presenting other problems similar to those so commonly known to have arisen in connection with Kansas City, Mexico and Orient; and it was plainly the intention of Congress to make the Interstate Commerce Commission the judge of the necessity for any additional construction. As

was pointed out in the **New England Divisions Case, Akron, Canton & Youngstown Rwy. Co. vs. U. S.**, 43 Sup. Ct. Rep., 270, advance sheet of March 15, 1923:

> "Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. Railroad Commission of Wisconsin vs. C. B. & Q., 257 U. S. 563, 66 L. Ed. 371. Theretofore, the efforts of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language and to attain it, new rights, new obligations, new machinery, were created. The new provision took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed."

In the **Wisconsin Rate Case**, referred to in the foregoing quotation, Chief Justice Taft, speaking of the scope and purpose of the Transportation Act, said:

> "The Act sought to avoid excessive incomes accruing, under the operation of Sec. 15a, to the carriers better circumstanced, by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and, third, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.
>
> "It is manifest from this very condensed recital that

the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.

"It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure, violate the specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case, 234 U. S. 342, 358, 34 Sup. Ct. 833, 58 L. Ed. 1341, that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, can not exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. * * *

> "Congress in its control of its interstate system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic."

The only means by which investment can be prohibited in useless railroad properties or in railroad properties which have no prospect of being self-sustaining, is by the use of a process analogous to the writ of injunction. Once the investment is made it can not be retrieved. The junk or salvage value of a piece of railroad is notoriously less than the cost of construction and the purpose of Congress, to enable the Commission to grant or withhold these permits, will be completely foiled, and the purpose of this portion of the law entirely annulled, if it should be held that a railroad corporation is not subject to this portion of the act until it has constructed a railroad and commenced to operate it in interstate commerce. If such a decision should be reached, the only effect of this provision of the law would be to prevent the construction, by existing interstate carriers, of branches and extensions, and would leave them and the public completely at the mercy of independent individuals who might seek to parallel their lines and decrease their traffic by new construction. Certainly it should not be held, except as a last resort, that an existing carrier sorely in need of traffic, as the Orient or the San Antonio, Uvalde & Gulf, may not be permitted to invade the territory of another railroad, but that the same thing may be done with impunity by an independent syndicate bearing the same

relation to the standard railroads of the country that the wildcatter bears to the petroleum industry.

The plain language of paragraph (18) of Section 1 of the Interstate Commerce Act clarifies the intention of Congress to subject to the terms of that paragraph not only companies having lines already built but also companies not yet having a line of railroad but constituting mere potential factors in the business of transporting interstate commerce. The act prohibits the construction of "a new line of railroad" by a carrier subject to the act without the consent of the Commission. It also prohibits the construction of branches and extensions in the same way. It thus provides against construction, without a permit, of every possible kind of railroad (except industrial spurs and other excepted classes); for the reason that any construction by an exisitng line would be, at least under the statutes of the State of Texas, either a branch or an extension. In this connection, the Court should note that under the Texas statutes an existing railroad corporation may only amend its charter to extend its main line or to construct or extend branch lines, and the Statutes of Texas would not, for instance, authorize the amendment of the charter of the San Antonio, Uvalde & Gulf Railroad to permit the construction of a new and detached line of railroad from Brownsville to Kingsville. See Exhibit "A", Article 6421, infra p. 125. Therefore, so far at least as the Texas Statutes are concerned, the words "a new line of railroad" when used in contra-distinction to "extensions and branch lines" necessarily mean such a situation as is here presented to the

Court. If any other construction should be placed upon this portion of the Act it would nullify the meaning of the words "a new line of railroad" and would convict the Congress of the employment of words without meaning, at least so far as concerns the construction of railroads in the State of Texas, which, as the Court well knows, constitutes a considerable portion of the country.

We must also recur to the allegations quoted above to the effect that the Defendant Asphalt Belt Railway Company was brought into existence at the instance of its co-Defendants, by which all funds and property used for the payment of its capital stock were supplied; that it is entirely controlled and absolutely dominated by its co-Defendants and is in fact their subservient creature and is and will be considered and treated by them as a mere division of their railroad; is their mere subsidiary corporation; that its line will in fact be a mere extension of their line; that its condemnation petition was filed at their instance and demand; that their purpose in creating it was to create a mere subsidiary to be controlled and dominated by them and owned and operated in a common interest and for a common purpose and for the benefit of the Defendant Railroad Company; that the effort to construct said line as the property of Defendant Railway Company is a simple subterfuge and evasion; that their outstanding securities are held in a common ownership; that the owners of the securities controlled and dominated the policies of the Defendant Railroad Company and have caused the incorporation of Defendant Railway Company and it is their purpose to cause the construc-

tion and operation of its line to be accomplished and conducted as a mere branch, division or extension of the existing line owned by Defendant Railroad Company and that the existing railroad and the proposed railroad shall be owned by substantially the same parties, operated under a common management and control, for a common purpose, and in the advancement of a common interest. These allegations, admitted by the motions to dismiss, must have a decided bearing upon whether or not Defendant Railway Company is a carrier subject to the Act. The general rule is that:

> "* * * The legal fiction of distinct corporate existence may be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct or another corporation." (14 C. J. Sec. 25.)

**United States vs. Lehigh Valley Railroad Company**, 220 U. S. 257, 55 L. Ed. 458, was a case involving the commodities clause contained in Paragraph (8) of Section 1 of the Interstate Commerce Act. The Government's bill alleged that the Defendant Railroad Company was not only the owner of the Coal Company's stock, but that the Railroad Company so used the power resulting from this stock ownership as to deprive the Coal Company of any real independent existence and to make it virtually but an agency or department of the Railroad Company. Facts were alleged in detail showing that there was no distinction in practice between the Coal Company and the Railroad Company, and the contention was therefore made that the Railroad Company was the real owner of the coal shipped by the Coal

Company. In sustaining this contention, based on no stronger facts than those contained in the Bill filed in the case at bar, the Court said:

> "That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company, is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which is exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company and would not have existed without such ownership. The error, however, lies in having disregarded the fact that the allegations of the amended bill asserted the **existence of a control** by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the result of a bona fide exercise of such ownership, and which could only have arisen **through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad.** Indeed such a situation could not have existed had the fact that the two corporations were separate and distinct entities been regarded in the administration of the affairs of the coal company. * * *"
> (Blackface ours.)

In **Luckenbach S. S. Co. vs. Grace**, 267 Fed 676, opinion by the Circuit Court of Appeals for the Fourth Circuit, Writ of Certiorari denied, 254 U. S. 644, suit was brought to recover for a breach of a contract of affreightment. The issue was whether the Luckenbach Company could be held liable for the default of the Luckenbach S. S. Company. The steamship company had a capital stock of $10,000.00; the Luckenbach Company was capitalized at $800,000.00. They had the same directors and the same officers, and Luckenbach, who was president and general manager of both companies, owned 94 per cent of the steamship stock and 90 per cent of the other company's stock. The latter company owned practically all of the steamers used by the former, and those steamers were leased to the steamship company on rather nominal terms, obviously far below their rental value. In holding the parent company liable for the breach of the contract, the court said:

> "Putting aside any inquiry into the motive for this arrangement, we think it too plain for serious question that the facts here considered show such identity of the two corporations, or at least give rise to such a strong presumption of their identity, as warrants the conclusion that the Luckenbach Company is equally responsible with the steamship company for the breach by the latter of its contract with the appellee. **For all practical purposes, the two concerns are one**, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000.00 corporation, which is simply itself in another form. We have only to add that on this issue the case is covered in our recent decision in the Willem Van Driel, Sr., 252 Fed. 35, 39, 164 C. C. A. 147." (Blackface ours.)

In **The Willem Van Driel**, 253 Fed. 35, in which a writ of certiorari was denied by the Supreme Court (248 U. S. 566) a similar conclusion was reached. Here all of the stock in the elevator company was held by a railroad company, which latter corporation dominated and controlled every act and deed of the elevator company. The Court, in holding the railway company liable for the negligence of the elevator company, used this language:

> "The elevator was constructed and operated merely as a facility to the business of the railroad company. Applying the language of Judge Wallace in Lehigh Valley Railroad Company vs. Dupont, 128 Fed. 840, 64 C. C. A. 478, 'the potential and ultimate control of all its property and the business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit.' Such complete dominance and control by the railroad company made the elevator company its mere puppet (U. S. vs. Delaware, L. & W. R. R. Co., 238 U. S. 516.)"

**Hudson v. Baker Motor Vehicle Co.**, 225 Fed. 1006, was an action on a bond. The Baker Motor Vehicle Company was alleged to be liable, on the ground that the maker of the bond was its subordinate corporation, or, in reality, a department. In sustaining this contention, the court used the following language:

> "The legal fiction of distinct corporate entity is disregarded, when necessary to do so in order to circumvent fraud, **and also when a corporation is so organized and controlled and its affairs are so conducted as merely to make it an instrumentality or adjunct of another corporation.** And it matters not how deftly the transaction is concealed by a succession of adjuncts and in-

strumentalities with corporate names all under one control, nor how many bankruptcies are put through for the benefit and emolument of the real company or corporation, which in fact owns and controls the business. When, as here, these adjuncts are used as mere agents for all purposes, except the payment of their just debts, the liability of the real managing and controlling corporation is neither released nor shifted, unless by some arrangement or agreement made by the creditor with knowledge of the facts, so as to create either an estoppel or ratification. Any other rule, adopted or sanctioned by the courts, not only defeats justice, but opens the door for the perpetration of the grossest frauds. In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609, we have an application of this exception to the general rule of corporate entity. It was there held:

'A partnership engaged in the commission business, and in buying and selling merchandise, acquired for partnership purposes 99 per cent. of the outstanding stock of a manufacturing corporation; the remaining shares being held by relatives of one of the partners. The partners held about equal amounts of the stock, and, as directors and officers, managed the business of the corporation; the partnership taking and selling all of its output. **Held**, that the corporation was merely an agency of the partnership, and its property assets of the bankrupt estate to which the receivership of such estate would be extended, and the respective rights of partnership and corporate creditors would be determined in the bankruptcy proceedings.'

"In Gay v. Hudson River Electric Power Company, 187 Fed. 12, 15, 109 C. C. A. 66, the same doctrine was considered, but the order in that case was affirmed on other grounds."

In **Muncie Pulp Company**, 139 Fed. 546, certiorari denied 202 U. S. 621, the same rule was adhered to. The Pulp

Company, which subsequently became bankrupt, caused the incorporation of the Great Western National Gas & Oil Company and the transfer of its gas and oil leases and lands. The president and treasurer of the Pulp Company owned all of its stock and also all of the stock of the Great Western Company, though one share was put in the name of a third party for the purpose of having a resident director in Indiana. The Great Western Company was treated as an agent of the Pulp Company for the development of its business, especially for the supplying of cheaper motive power. The Pulp Company, having become bankrupt, the receiver demanded the delivery to him of the property in the possession of the Great Western Company as a part of the assets of the Pulp Company. The court sustained his contention, saying:

> "The Great Western Company was undoubtedly a mere creature of the pulp company, having no independent business existence, and organized solely for the purpose of facilitating the business of the latter."

To the same effect is the decision of the Circuit Court of Appeals for the Fourth Circuit in **The Foard Company vs. Maryland,** 219 Fed. 827, in which the Court said:

> "The District Court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as independent contractor and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a de-

partment of the business of the Foard Company as shipbrokers and agents. The two companies had the same officers; the stevedoring company handled no funds, except through the Foard Company; its losses were paid by the Foard Company and dealt with as if they were that company's own losses. All of the profits of the stevedoring company were kept by the Foard Company as a charge for managing the business. There are other like circumstances, but these are sufficient to show that the stevedoring company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded, as to the outside public, identical. Interstate Telegraph Co. vs. Baltimore, etc., Co. (CC) 51 Fed. 49; Baltimore & O. Telegraph Co. vs. Interstate Telegraph Co., 54 Fed. 50, 4 C. C. A. 184; in re Watertown Co., 169 Fed. 252, 94 C. C. A. 528; Chicago, etc. Co. vs. Myers, 168 Ill. 139, 48 N. E. 66."

The only difference between the case at bar and most of the cases next above referred to is that here the intention and purpose of the parties has been alleged, and admitted by the motions to dismiss, while in those cases the courts were dealing with accomplished facts. No other allegations could have been made in the instant case because the purpose of the suit was to prevent the violation of law threatened by the defendants in advance of its actual consummation. The rule to be applied, however, must necessarily be the same and in the light of the decisions quoted above it can not be denied that the allegations of the Bill in the instant cast, admitted as they were, show conclusively that the two corporate Defendants are, in contemplation of law, at least so far as concerns the construction and op-

eration of a line of railroad, one and the same, and that therefore the character of one as a carrier subject to the Act necessarily attaches to the other; or, at least, that the subsidiary, which is only a mere department or division of the parent company, is necessarily employed in the business in which the parent is engaged.

There is another expression in this paragraph (18) that leads to the same conclusion. Provision is made for "a carrier subject to the act" desiring to construct a new line of railroad to secure a permit from the Interstate Commerce Commission on due application. If we assume that a corporation has been organized under the Texas laws to build from Dallas to a point on the state line and to connect with a line in another state with the intention of engaging in interstate commerce as soon as the construction is completed, how can such a certificate or permit be secured unless that carrier, at the instant of its incorporation, is "a carrier subject to the act"? If it is not a carrier subject to the act it has no right to make application to the Commission and the Commission has no right to grant it a permit. If it is a carrier subject to the act, as we think it plainly is, then it is such, not by virtue of the fact that it has a railroad in existence over which interstate commerce is being moved, but by reason of the fact that it has been incorporated to construct and operate such a railroad and intends to do so, and under our laws has that obligation imposed upon it. In other words, **it is a potential carrier of interstate commerce,** and is therefore entitled to apply to the Commission for a certificate or permit.

Four important cases have been decided by the Supreme Court in which the construction of portions of the Transportation Act have been drawn in question, that is to say, the Wisconsin Rate Case, The Eastern Texas Railroad Case, the New England Divisions Case and the Pennsylvania Labor Board Case. In disposing of each of those cases the Court has made it plain that it regarded the Transportation Act as a great piece of constructive legislation, which it was the duty of the Court to construe liberally in order to effectuate the great purposes and to accomplish the results obviously intended by Congress. If, notwithstanding the allegations of this Bill of Complaint to the effect not only that the Defendant Railway Company is obliged by law to handle interstate commerce as soon as its road is completed, but that **it will in fact** handle such commerce, all of which allegations are necessarily admitted by the motions to dismiss, it shall be held that the law is not applicable in the instant case simply because no railroad has been constructed and no interstate commerce hauled over it, then indeed the Act will have been wiped from the books. That result can only be reached by giving to the expression "a carrier subject to the act" a narrow and technical definition plainly at variance with the intention of Congress, plainly violative of the spirit of the law, plainly out of harmony with the purpose intended to be accomplished and in conflict with the well known and long adhered to practice of the Interstate Commerce Commission in permitting new railroads to file their tariffs in advance of the movement of a single pound of commercial freight, although the law permitting the fil-

ing of tariffs is applicable, just as paragraph (18) only to "carriers subject to the Act."

It is submitted, therefore, that paragraph (18) plainly applies to these Defendants. What does it forbid? (a) It prohibits the carriers to which it is applicable from undertaking the extension of their lines of railroad. The Bill alleges and the motions admit that this proposed line will constitute the extension of the existing line of railroad owned and operated by the Defendant Railroad Company and its receivers. (b) It prohibits the construction of a new line of railroad. The Bill alleges and the motions admit that if the proposed construction will not constitute an extension of the existing line of the Defendant Railroad Company it will be the construction of a new line. (c) It prohibits the acquisition or operation of any line of railroad or extension thereof and provides that no such carrier shall engage in transportation under this Act over or by means of such addition or extended line. In this respect also the Bill has tracked the statute and has alleged that the Defendants intended and were threatening to engage in interstate commerce over the proposed line upon its completion, and would in fact do so unless restrained.

Paragraph (19) relates solely to the procedure before the Commission in case an application is made for the issuance of a certificate of public convenience and necessity. After giving to the Commission the broadest power to reject the certificate, or to grant it upon such terms and conditions as its discretion may dictate, paragraph (20) provides bluntly

that "any construction, operation or abandonment contrary to the provisions of this paragraph, or of paragraph (18) or (19) of this section, may be enjoined by any court of competent jurisdiction."

It will be observed that no special equities on the part of the Complainants are required. The injunction to be issued is not an equitable injunction, to be issued only in case the Complainants have no adequate remedy at law, although it may be said that, taking into consideration the purpose of the Act, there can be no adequate remedy aside from an injunction. However, as the injunction may issue on complaint of the Government, the Commission, or any State Commission, it may be assumed that no special equities, aside from the general interest of the public in preventing the construction of a railroad in violation of the Act, were contemplated by the Congress as a prerequisite to the success of the suit.

However, even if special equities are required by Complainants other than the Government, or Governmental bodies, these Complainants have clearly shown that such exist. They have shown that it would be extremely expensive to prove their damages in the pending condemnation case and that these expenses could not be recovered as any part of the costs or damages recoverable by them in a proceeding for condemnation. They have shown that their land, devoted to mining purposes and extremely valuable for those purposes, is about to be crossed by this proposed railroad in utter violation of law and that if the road is con-

structed as proposed the mining operations now carried on upon the premises, and there to be conducted in the future, will, of necessity, be limited and hampered by the existence and proximity of a line of railroad; that their premiums for liability insurance will be vastly enhanced, or, if they fail to provide such insurance to protect them against possible claims for damages to the railroad, its equipment and traffic, they will be constantly subjected to claims of that character on account of the violent nature of the mining operations. If a land owner is a party in interest, as was held in the case cited above, in which, by the way, the Court did not apparently require any showing of special equities, then a case could hardly be imagined in which such a land owner would have less remedy at law, or be more dependent upon the issuance of a writ of injunction than under the facts shown here.

## IV.

## THE PROSECUTION OF THE PROCEEDING FOR CONDEMNATION IS A PART OF THE PROPOSED CONSTRUCTION AND, AS SUCH, SUBJECT TO INJUNCTION, NOTWITHSTANDING SECTION 265 OF THE JUDICIAL CODE.

The Appellees have also contended that the Court has no jurisdiction to restrain the prosecution of the condemnation proceeding now pending in the County Court of Uvalde County, Texas, by reason of Section 265 of the Judicial Code (U. S. Compiled Statutes, 1916, Vol. 2, Sec. 1242, R. S. Sec. 720). This section reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

There would seem to be two sufficient reasons why this position of the Appellees can not be successfully maintained:

(1) Paragraph (20) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, reads in part as follows:

> "Any construction . . . contrary to the provisions of . . . paragraph (18) . . . of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or states affected, or any party in interest. . "

Paragraph (18) of Section 1 of the Interstate Commerce Act as amended reads as follows:

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless or until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there

shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act are much later in point of enactment than Section 720 of the Revised Statutes of the United States, having been added to the Interstate Commerce Act by the Act of February 28, 1920; and if, as can be shown, the condemnation suit in question is an integral part of the construction of the defendant's proposed railroad, the necessary effect of the Transportation Act is to repeal or modify, to this extent, the provisions of Section 720 of the Revised Statutes, otherwise known as Section 265 of the Judicial Code. See **U. S. R. R. A. v. Burch** below cited.

Is the pending condemnation suit a part of the construction of the proposed railroad? In order to answer this query it is necessary to determine the essential steps required to be taken in the construction of a railroad. Logic impels to the conclusion that all of those steps absolutely essential to the completion of the road are necessary parts of its construction. It is obvious that in the first place there must be a determination in some manner, whether by survey or otherwise, of the location of the proposed line. There must also be acquired for the proposed line a right of way upon which it may be laid, and the question whether this right of way shall be acquired by purchase or by condemnation is wholly immaterial to the present inquiry because that is merely a question of means or methods. The

right of way must be in some manner acquired or else the builders of the road will find themselves in the position of having constructed a railroad upon the real estate of others and of thereby having given the railroad to the other parties, because, being attached to the realty, it becomes a part thereof, and the title immediately passes to the owner of the real estate. Only after the right of way has been acquired can the physical construction, such as the grading and the laying of track, be safely begun. We lay it down, therefore, as a proposition that the acquisition of a right of way for a proposed road is an essential element of the construction of that road and is just as much a part of the construction program as the physical work of spiking the rails to the ties.

This course of reasoning is justified by the opinion of Mr. Justice Van Devanter in **Pederson vs. D. L. & W.**, 229 U. S., 146, which was a suit under the Employers' Liability Act for personal injuries sustained by an iron worker employed by the Defendant railroad in the alteration and repair of a bridge. At the time of his injury the plaintiff was carrying to a bridge some bolts or rivets which were to be promptly used in repairing the bridge, which was regularly used in interstate and intrastate commerce. The question, of course, was whether the plaintiff, at the time of his injury, was "employed in interstate commerce." The opinion is, in part, as follows:

> "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was em-

ployed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair . . . We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is:

Is the work in question a part of the interstate commerce in which the carrier is engaged?

This language of the court may be paraphrased with peculiar aptness in this case as follows:

"That the construction of a line of railroad in violation of paragraph (18) of Section 1 of the Interstate Commerce Act may be enjoined is conceded; and so we are only concerned with the nature of the work in which the defendant was employed at the time of the filing of the bill. Among the questions which naturally arise in this connection are these: Was that work being done independently of the construction program upon which the defendants had determined, or was it so closely connected therewith as to be a part of it?

> Was its performance a matter of indifference so far as that construction was concerned, or was it in the nature of a necessity imposed upon the defendant? The answers are obvious. A right of way is as indispensable to the construction of a railroad as are ties and rails, and logic and common sense demand that all of the instrumentalities (right of way, ties, rails and other materials) be provided . . . . The contention to the contrary proceeds upon the assumption that the construction of a railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the construction which has been planned?"

There is another cogent reason why the Court should consider the condemnation of a right of way to be a part of the construction of a railroad and therefore subject to injunction under paragraph (20), Section 1, of the Interstate Commerce Act, regardless of the provisions of Section 720 of the Revised Statutes. By paragraph (5) of Section 20 of the Interstate Commerce Act as now amended it is provided that "The Commission may in its discretion prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys." Under this provision of the Act, which has now been in force for many years, the Interstate Commerce Commission has prescribed an accounting system for the carriers subject to the act. In this classification of accounts, Account No. 2 is headed: "Land for transportation

purposes." This is one of the capital accounts, showing the cost of property, and including the following, among other accounts:

1. Engineering
3. Grading
8. Ties
9. Rails
12. Track laying and surfacing
16. Station and office buildings
20. Shops and engine houses
26. Telegraph and telephone lines.
41. Cost of road purchased.

In listing the items which may be charged to Account No. 2, the Commission includes the following:

> "Condemnation expenses, including court costs and special counsel fees." (Classification of investment in road and equipment of steam roads prescribed by the Interstate Commerce Commission in accordance with Section 20 of the Act to regulate Commerce, Issue of 1914, effective on July 1, 1914).

It must be borne in mind that this classification of accounts, prescribed by the Interstate Commerce Commission has the force of law. Having been in force for six years or more at the time of the enactment of the Transportation Act, 1920, Congress may fairly be presumed to have provided for the writ of injunction to restrain the construction of a railroad in the light of the character so given by the Interstate Commerce Commission to the elements entering into such construction. A few of the authorities showing the weight given by the courts, in construing a staute, to a long established practice or ruling of

a Government department have been cited above, and need not be again referred to. We, therefore, have the finding of the Interstate Commerce Commission made in the course of its administration of that part of the Act authorizing it to prescribe a system of accounts, as well as the guide of logic and sound reason, in accord upon the proposition that the condemnation proceeding is so much a part of the construction of the proposed railroad that it can clearly be enjoined under paragraph (20) as a part of such construction.

(2) In the original Bill of Complaint it was alleged that:

> "The Defendant Asphalt Belt Railway Company, at the instance and upon the demand of its co-defendants herein, has heretofore presented to the County Judge of Uvalde County, Texas, its petition for the condemnation of certain lands more particularly described in said petition, a copy of which, marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof, for right of way and other railroad purposes for the line of railroad undertaken to be constructed, and has caused the said County Judge to appoint Commissioners, as provided by the laws of the State of Texas, to assess the damages which will accrue to the defendants named therein in case of such condemnation. Complainants further show that said Commissioners have caused the Defendants in said condemnation proceeding, to-wit: Complainants herein J. B. Smyth and W. A. Smith, to be served with notice of hearing upon the question of such damages and have set said matter for hearing before them, the said Commissioners, in the City of Uvalde, Texas, on the 31st day of July, 1923, at which time the Defendants herein, unless restrained, will insist, according to the best of Complainants' information and belief, upon the hear-

ing and determination of said matter by said Commissioners." (R. 5-6.)

At the time of the filing of the original Bill, therefore, the condemnation proceeding had gone no further than the appointment of Commissioners by the County Judge and the fixing by the Commissioners of a date for a hearing, to-wit, July 31, 1923. The first hearing of the application for injunction occurred on July 30, 1923. (R. 46, 83.)

The situation, as it existed at the time of the filing of the Bill in this cause, authorized the issuance of the injunction at that time, because there was not then pending, in the language of Section 720 of the Revised Statutes, any "proceeding in any court of a state" because the condemnation proceeding had not then reached any court; and the present situation authorizes the writ of injunction to restrain the prosecution of that proceeding in order to maintain the jurisdiction of this Court which attached at the time of the filing of the Bill.

It must be borne in mind that the proceedings referred to in Section 720 of the Revised Statutes of the United States are **court** proceedings. That statute has no reference to extrajudicial or to executive or administrative proceedings. The question, therefore, arises whether the proceeding for condemnation was a court proceeding at the time when the Bill was filed in this suit. At that time the Defendant Asphalt Belt Railway Company had presented its petition to the County Judge of Uvalde County, Texas, for the condemnation of certain lands described in that peti-

tion, as provided by Article 6506 of the Revised Statutes of Texas. The County Judge, as provided by Article 6508, had appointed three commissioners to assess the damages. The Commissioners had been sworn, as provided by Article 6509, had selected a day and place of hearing and had issued a written notice to the parties and had caused this notice to be served and returned, as provided by Articles 6510 to 6513, inclusive. At that point, and before any hearing or award by the Commissioners, the Bill was filed in this suit.

It will be observed upon reading the provisions of Chapter 8 of Title 115 of the Revised Statutes of Texas that a petition for condemnation is not filed in the County Court, and is not supposed to be docketed in that Court, and that the Court **as such** does not appoint the Commissioners. Under the statutes the petition is presented to the County Judge, who, as the presiding officer of the Commissioners Court, is an executive officer and who as the Judge of the County Court is a judicial officer. The statute could as well provide that the petition be presented to, and the Commissioners appointed by, the Sheriff or the Governor or the Tax Collector, or any other executive officer. It will also be observed that there is no provision made in the statute for any action by or recourse to the County Court or any other court in a condemnation proceeding until the expiration of ten days after the Commissioners make their award. At that time, if no opposition has been filed to the award, which, under Article 6522, is not filed with the Court, but again with the County Judge, it is made the duty of the

County Judge, by Article 6528, "to cause the said decision to be recorded in the minutes of his Court, and shall make the same the judgment of said Court, and may issue the necessary process to enforce the same." If an opposition is filed within ten days, "the adverse party shall be cited and said cause shall be tried and determined as other civil causes in said court." (Art. 6527.) This provision for a citation by the Court to the adverse party is illuminating. If the proceedings had been pending in the Court prior to the award of the Commissioners, what necessity would there be for the issuance of process by the Court?

The Articles of the Texas Statutes relating to condemnation proceedings and referred to above are printed in full and attached to this brief marked "Exhibit A".

However, there is no necessity to rely upon reason and logic alone to establish the proposition that at this stage of a condemnation proceeding it is not a court proceeding. The Supreme Court of the United States has so decided on more than one occasion.

In **Mississippi & Rum River Boom Company vs. Patterson,** 98 U. S., 403 25 L. Ed. 206, the Boom Company commenced a condemnation proceeding against Patterson under the laws of Minnesota. Referring to the provisions of those laws, Judge Field, speaking for a unanimous court, numbering among its members such eminent lawyers as Judge Miller, Judge Bradley, Judge Clifford and Judge Harlan, said:

"The law is so framed as to give proper notice to the

> owners of the land and secure a fair appraisement of its value. If the award of the Commissioners should not be satisfactory to the Company or to any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the Clerk 'as a case upon the docket' of the court . . . The Court is then required to proceed to hear and determine such case in the same manner as other cases are heard and determined in said court."

The application for the appointment of commissioners was made under the Minnesota Statute to the District Court itself.

The parties were not satisfied with the award of the Commissioners and both appealed from this award to the District Court. When the case was brought before the District Court, Patterson, a citizen of Illinois, applied for and obtained a removal to the Circuit Court of the United States. Objection was made to the jurisdiction of the Circuit Court on the ground that the petition for removal was presented too late. The contention was overruled upon the ground stated thus in the opinion:

> "The proceeding in the present case, before the Commissioners appointed to appraise the land was in the nature of an inquest to ascertain the value and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the Commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

The same question was decided later by the same Court in the **Pacific Railroad Removal Cases**, (Union Pacific Rwy.

Co. vs. Myers, 115 U. S., 1, 29 L. Ed. 319) in which a condemnation case had been instituted against the Union Pacific by a municipal corporation. Under the State law the Mayor of the municipality summoned a jury to assess the damages, the jury gave its award, which was affirmed by the Mayor and common council, and the Railway Company thereupon appealed to the Circuit Court of Jackson County, Mo., and in due time filed a petition for removal to the Federal Court. Justice Bradley, speaking for the Court, said:

> "The second ground of objection, that the cause had been once tried before the Mayor by a jury, and an appeal taken, before a petition for removal was filed, and therefore the application was made too late, is answered by the reasoning of this Court in the case of Boom Co. vs. Patterson, 98 U. S. 403, (Bk. 25, L. Ed. 206), which was a case very similar in this respect to the present. It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned by the right of eminent domain, and was 'not a suit at law in the ordinary sense of those terms,' consequently not 'a suit' within the meaning of the Removal Acts; but that 'when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents'. In that case, 'the point in issue on the appeal was the compensation to be made to the owners of the land; in other words, the value of the property taken. No other question was open to contestation in the district court.' The court therefore considered the case to be within the rule laid down in Gaines vs. Fuentes, 92 U. S., 20 (Book 23, L. Ed. 528), in which it was held that a controversy between citizens of different states is involved in a suit

whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. And, in this view, the case of Boom Co. v. Patterson, was held to be removable to the Federal court. That case, we think, governs the present, so far at least as relates to the trial before the mayor, which was in its nature an inquest of valuations and assessments, not having the character of a suit."

That Section 720 of the Revised Statutes of the United States does not apply to proceedings which are not judicial in character as well settled. In **Prentis vs. Atlantic Coast Line,** 211 U. S., 210, 53 L. Ed. 150, which was a suit to restrain the Virginia Corporation Commission in its activities relating to rate regulations, the Court said:

"We shall assume, as we have said, that some of the powers of the Commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this award and to punish them for a breach, it then would be a sitting as a court and would be protected from interference on the part of the courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. . . . The establishment of a rate is the making of a rule for the future and therefore is an act legislative, not judicial, in kind, as seems fully recognized by the Supreme Court of Appeals. . . ."

"Proceedings legislative in nature are not proceedings in a court, within the meaning of Revised Statutes, Sec. 720. No matter what may be the general or dominant character of the body in which they may take place."

Proceedings before State Commissions have been affected by the writ of injunction issued out of Federal Courts in rate matters so consistently since a date prior to the institution of the suit, which upon appeal is styled **Reagan v. Farmers Loan & Trust Company**, 154 U. S., 362, including the injunctive process issued in this Circuit in the Shreveport case, that it is hardly worth while to burden the court with the citation of such cases.

In **Murray v. Wilson Distilling Co.**, 164 Federal, 1, the Court held that the commission appointed by the State of South Carolina for the settlement of claims against the State Dispensary was not a court whose proceedings could not be enjoined under Section 720 of the Revised Statutes. The decree in this case was subsequently reversed by the Supreme Court on another ground, but it was not held that the Circuit Court of Appeals had ruled erroneously upon this question. Likewise, in **Busch vs. Webb**, 122 Fed., 655, Judge Bryant of the Eastern District of Texas held that the Commissioners' Court of Grayson County in declaring and publishing the result of an election was not a court and that such declaration was not a proceeding in Court under the terms of this statute.

In **Nueces Valley Townsite Company vs. McAdoo**, 257 Federal, 143, the Court below was called upon to construe Section 720 of the Revised Statutes in a suit seeking to restrain the removal from North Pleasanton of the Division Headquarters of the San Antonio, Uvalde & Gulf Railroad. A

restraining order had been issued in the State court and upon removal the Court dissolved it, saying:

> "In United States Railroad Administration v. Burch, (D. C.) 254 Fed. 140, the proposition was directly involved and directly ruled upon. A judgment had been obtained against the Atlantic Coast Line Railroad Company in a state court of South Carolina, after assumption of government control, upon a cause of action arising prior to that period. It had been levied upon certain real estate, and the Director General brought suit in the District Court of the United States to enjoin further proceedings under the execution. The jurisdiction of the Federal Court was contested, but sustained; Judge Smith (page 145) saying:
>
> " 'The defendant in his return to the rule has raised the question that this court has no jurisdiction of the cause, and cannot enjoin a sale under execution under a judgment in a state court. Inasmuch as this question is a question arising in a case which asks for the enforcement of a right claimed to exist and be given under the terms of an act of Congress, it is evidently an action of a civil nature in equity, brought by an officer of the United States authorized to sue, and arising under the laws of the United States, where it appears upon the face of the bill of complaint that the right claimed by the plaintiff and sought to be enforced arises by virtue of and under a statute of the United States. The question whether or not final process can be levied against this property is one that arises under the very terms of the act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court, upon usual principles under which courts of equity will enjoin the

enforcement of a judgment. Simon v. So. Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. . . .

"Further, **the special statutory exemption from process**, created by the act of March 21, 1918, **must be constructed in connection with the provision of Sec. 265 of the Judicial Code** of the United States (Comp. Statutes Sec. 1242), as modifying the language of that section, and creating another exception, under which the attempted enforcement of the means and final process from a state court may be restrained in proper cases.'

"While the relief sought in that case was denied upon the ground that the property levied upon was not in the possession of the Director General, the jurisdiction of the court to issue the injunction was clearly sustained."

The action of the court below in that case is in entire harmony with our contention that the Transportation Act modified Section 720 of the Revised Statutes to the extent of permitting an injunction against proceedings in the State court if those proceedings constitute a part of the construction of a railroad which is being proceeded with in violation of paragraph (18) of Section 1 of the Interstate Commerce Act. That, in effect, was the point ruled in **United States Railroad Administration vs. Burch**, 254 Fed. 140.

That a Federal Court has the right to enjoin proceedings in State courts in order to maintain its own jurisdiction has been repeatedly held.

In **Looney v. Eastern Texas Railroad Company**, 247 U. S. 214, the Attorney General, despite the institution of a proceeding by the Railroad Company in the Federal Court, instituted a conflicting suit in the State Court. The Complain-

ants in the suit in the Federal Court filed a Supplemental Bill and the Court issued a temporary injunction restraining the prosecution of the suit in the State Court. The Supreme Court dismissed the Attorney General's appeal from this temporary injunction saying:

> "The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice. . . So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that Section 265 of the Judicial Code, Revised Statutes, Section 720, Act of March 2, 1793, c. 22, 1 Stat. L. 334, has repeatedly been held not applicable to such an injunction. Julian v. Central Trust Company, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492."

If the court below is a court of competent jurisdiction and as such entitled to restrain the construction of a railroad in violation of paragraph (18) of Section 1 of the Interstate Commerce Act, it is entitled to issue all writs necessary to enforce its jurisdiction over the subject matter of such injunction. It is, therefore, plainly entitled to enjoin the condemnation proceeding, even assuming it to have been a proceeding in court, because that condemnation proceeding has no purpose aside from the construction of the proposed road, could serve no end except to provide a right of way for that road and is so essential to the construction of

the road that under the decision of the Supreme Court in **Pederson vs. D. L. & W** (supra), it must be deemed to be a part of that construction.

If it was not the intention of Congress to authorize the Federal Courts to issue the writ of injunction in a cast such as this, the conclusion can not be avoided that in such event Congress intended to confer upon the State courts the power to prohibit the unlawful construction of railroads by the most appropriate process while withholding that power from the Federal Courts which are primarily charged with the construction and enforcement of the Federal law. We have no doubt that the court will be loath to adopt a construction of an act of Congress which would produce such an anomalous result.

In connection with the action of the Court in dismissing the Bill, as amended and supplemented, there only remains for consideration the matters specially set out in the Second Amended and Supplemental Bill of Complaint. (R. 47-63.) In considering the subject matter of this amendment, the circumstances attending the filing thereof must be borne in mind.

At the hearing of July 30, 1923, it developed from the testimony of the Defendant Ponder (R. 86-87) that there was a contract made between the Texas Rock Asphalt Company, Mr. Kell and Mr. Eldridge relating to the construction of the proposed line of railroad and the financing of its cost; that this contract was reduced to writing and the original is still in force. A copy of the contract was introduced

in evidence (R. 102) and appears in full as an exhibit to the Second Amended and Supplemental Bill of Complaint (R. 54) and in the statement of the evidence (R. 111). That the Complainants upon being advised of the contents of this contract, which was produced by the Defendants at the hearing, asked leave to amend their Bill of Complaint with reference thereto, appears from the terms of the order of July 30th, (R. 46) in which the Complainants were given leave to amend within ten days, and from the Second Amended and Supplemental Bill of Complaint, which was lodged with the Clerk on August 7, 1923. (R. 63).

It also appears from the Original Bill of Complaint, (R. 6) that the condemnation commissioners had, at the time of the filing of the Original Bill, set down for hearing before them on July 31st, the matter of assessing the damages in the condemnation proceeding, and, from the Second Amended Bill it appears that prior to the time when that instrument was lodged with the Clerk the Commissioners had held a hearing and had entered an award of condemnation, to which the defendants in the condemnation proceeding had filed exceptions and that the condemnation proceeding was therefore pending then, for the first time, in the County Court of Uvalde County, Texas. It may, therefore, fairly be assumed that the Defendants in the condemnation proceeding were forced into a hearing of the same, before the Commissioners on July 31st.

The situation, therefore, had changed to some extent when the Second Amended and Supplemental Bill of Complaint was lodged with the Clerk for filing.

## V.

THIS SUIT HAVING BEEN INSTITUTED TO RESTRAIN THE CONSTRUCTION OF THE PROPOSED LINE OF RAILROAD AND, INCIDENTALLY, THE PROSECUTION OF THE CONDEMNATION PROCEEDING, PRIOR TO THE TIME WHEN SAID PROCEEDING BECAME ONE OF A JUDICIAL NATURE, THE COURT BELOW HAD THE POWER AND THE DUTY TO ENJOIN THE PROSECUTION OF SAID PROCEEDING IN ORDER TO MAINTAIN ITS OWN JURISDICTION NOTWITHSTANDING SECTION 265 OF THE JUDICIAL CODE, WHEN IT BECAME APPARENT, AS IT DID, THAT BY SAID PROCEEDING IT WAS SOUGHT TO APPROPRIATE PRIVATE PROPERTY TO A PRIVATE RATHER THAN A PUBLIC USE AND THUS TO TAKE SAID PROPERTY WITHOUT DUE PROCESS OF LAW AND OTHERWISE THAN ACCORDING TO THE DUE COURSE OF THE LAW OF THE LAND.

It is well settled that Section 265 of the Judicial Code does not apply to injunctions issued to protect the jurisdiction of the Federal Court. **(Foster's Federal Practice,** 6th Ed., Vol. 2, page 1346, Sec. 270a).

It is also well settled that a condemnation proceeding in its initial stages, prior to the time when an appeal has been taken from the award of the Commissioners to the Court to which such appeal lies, is not a judicial proceeding. **(Boom Company vs. Patterson,** and other authorities cited above).

It is also well established that when an amendment is filed it relates back to the date of the filing of the pleading amended, unless it sets up a new cause of action. **(31 Cyc, 464; Union Pacific R. Co. vs. Wyler,** 154 U. S. 285,

296, 39 L. Ed. 983, 990. In the case last cited the Court said:

> "The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby."

If the amendment relates back for the purpose of arresting the statute of limitations, no reason can be found why it should not relate back to enable the Court to maintain its own jurisdiction.

The subject matter of the litigation pending in the Federal Court at the time when the condemnation proceeding got into the County Court and thus became a condemnation suit revolved around the question whether the construction of the proposed railroad was lawful and whether the condemnation proceeding was a part of the plan of construction and whether or not both should be enjoined. In the original Bill of Complaint it had been alleged "that the effort on the part of the Defendants to condemn said property * * * is a trespass upon the property of said Complainants against which Appellants had no legal, adequate, certain or sufficient remedy at law." (R. 10).

In the First Amended Bill it was alleged that the condemnation proceeding will, unless restrained, be pressed and prosecuted in pursuance of the plan of construction and constitutes a substantial part of the undertaking to construct. (R. 40). The allegations in the Second Amended Bill of Complaint constitute a mere amplification of the

charge that the condemnation proceeding constitutes a trespass upon the property of the Complainants showing that, under the terms of the contract, the title to that portion of the road to be constructed over the property of these Complainants is to be vested in a private corporation and not in the petitioner in the condemnation suit. It is true that, under the contract, the petitioner in the condemnation suit was to have the right and obligation "to take charge of said entire line and maintain and operate the same free of cost to the Asphalt Company." (R. 114). This does not necessarily imply that the right of use to be acquired under the contract by the Defendant Railway Company is to be exclusive. The draftsman of the contract was at great pains to provide that the title to that portion of the road to be constructed at the expense of the Texas Rock Asphalt Company, being the portion to be constructed over the land of these Appellants, should not pass to the Defendant Railway Company, or to its predecessors in interest, Kell and Eldridge, until the Asphalt Company had, **by the process provided in the contract,** been fully reimbursed for the entire cost to it of constructing that part of the line. Under the process of reimbursement provided by the contract the entire title to that part of the line must be in the Asphalt Company when the road is completed and opened for operation, subject only to a mere right of use to be enjoyed by the Defendant Railway Company. In the absence of plain and specific language to the contrary, we have no right to assume that the owner of the prop-

erty is not to enjoy the use of it, nor is there any warrant in the language of the contract for the statement that the right of use granted by the language quoted above is to be exclusive.

It is familiar law that when a Federal Court has jurisdiction of a controversy by reason of the existence of a Federal question, it also has jurisdiction to determine questions arising under the Constitution or laws of a State. The Second Amended Bill of Complaint set up no new cause of action; it merely furnished an additional reason for the action by the Court which was prayed for in the Original Bill of Complaint, and certainly could not be said to have gone so far toward setting up a new cause of action as the Plaintiffs did in those cases where it was held that changing the plaintiff from an individual to an administratrix in order to take advantage of the Federal Employers Liability Act did not change the cause of action. **Missouri, Kansas & Texas Railway Company vs. Wulf,** 226 U. S. 570, 57 L. Ed. 355, **Seaboard Air Line vs. Renn,** 241 U. S. 293, 60 L. Ed. 1008.

If, prior to the time when the condemnation proceeding was docketed in the County Court of Uvalde County, as a case pending in that Court, it was proper for the Court, in order to maintain its own jurisdiction, to enjoin the prosecution of that proceeding, certain is it that when that situation was changed without the consent of these Appellants they did not lose their right to have the Court thereafter control the situation.

In any event, the Appellant Uvalde Rock Asphalt Compan was not a party to the condemnation proceeding, notwithstanding the fact that prior to the hearing held by the Commissioners in that proceeding, on July 31, 1923, the Complainant there had acquired knowledge of its interest in the property by the institution of this suit, in which the Defendant Railway Company's original answer was filed July 28, 1923 (R. 30-38). The Complainant Uvalde Rock Asphalt Company alleged in the Bill that the prosecution of this condemnation proceeding constituted a continuing trespass upon the land in which it had an interest. While it did not expressly pray for an injunction restraining a trespass upon its land, otherwise than by the mere prosecution of the condemnation petition, the facts alleged in the Bill, as amended, clearly show that the Court could rightfully have entered such an order under the prayer for general relief. In this respect, also, the Court obviously erred in dismissing the Bill. **Colorado Eastern R. Co. vs. Chicago, Burlington & Quincy Ry. Co.,** 141 Fed. 898, seems to be directly in point, the only difference being that there the Complainants showed no right to have the **institution** of the condemnation proceeding enjoined, such as exists here, by virtue of the express provision in paragraph (20) of Section 1 of the Interstate Commerce Act.

It seems plain, therefore, that the Court below fell into such error, in dismissing the Bill, as to require a reversal of the cause in order to permit a trial upon the merits. But if the Court also erred in refusing the application for

injunction that writ should be promptly issued by this Court, in order to restrain immediately the further construction of the railroad and the further prosecution of the condemnation case, which, as appears from the Second Amended and Supplemental Bill of Complaint, has now gotten into the County Court of Uvalde County, Texas, by the filing of exceptions to the award made by the Commissioners, "and will, unless restrained, be set down for trial at the ensuing term of said Court, which commences on, to-wit, the 17th day of September, 1923." In this connection it is only fair to add that counsel have agreed to continue the condemnation case at the current term of the County Court, but a new term of that Court will open on November 19, 1923. We pass then to a consideration of the propriety of the Court's order, insofar as it constitutes a refusal to issue the preliminary injunction as prayed for.

VI.

IN VIEW OF THE PLEADINGS AND THE EVIDENCE THE COURT BELOW ERRED IN REFUSING TO ISSUE THE PRELIMINARY INJUNCTION AS PRAYED FOR.

In support of the averments of the Bill as amended, the Complainants made the following showing:

The Defendant Asphalt Belt Railway Company was incorporated by the following individuals:

H. P. McMillan,
R. C. Tarbutton,
R. H. Schultz,

E. R. Breaker,
F. L. Lewis,
Mason Williams,
R. C. Hollifield,
R. A. Yelton,
Henri Bovy,
T. M. McCarthy.

The first seven of those named are nominated in the charter as the members of the first Board of Directors. (R. 120-123). The only officers elected are: H. P. McMillan, President, E. R. Breaker, Vice-President, R. C. Tarbutton, Secretary and Treasurer. (R. 101).

The Defendant Ponder testified that he was appointed Receiver of the Defendant Railroad Company about the first of the year 1917 and has been operating its line as such Receiver since that time; that H. P. McMillan holds the office of Auditor under him as Receiver; that R. C. Tarbutton is his Chief Clerk and Purchasing Agent; that R. H. Schultz is his Traffic Manager; E. R. Breaker his Superintendent of Motive Power and Maintenance of Way; F. L. Lewis is his Superintendent; R. C. Hollifield is his agent at Uvalde; Mason Williams is his General Attorney; R. A. Yelton is Chief Clerk to Mr. McMillan, the Auditor; Henri Bovy is a Clerk in the Auditor's office and T. M. McCarthy is a Stenographer and Clerk under Mr. Ponder as Receiver. (R. 83-84). Thus all of the incorporators and all of the Directors and all of the Officers of the Defendant Railway Company are employes of the Defendant Receiver, who is engaged in

operating the railroad of the Defendant Railroad Company.

The line of the Defendant Railroad Company runs from San Antonio through North Pleasanton to Corpus Christi. At North Pleasanton it has a line which runs west and north to Uvalde through Crystal City, and at Crystal City has a branch line running south to Carrizo Springs. The line proposed to be built is to start from a point on the rails of the San Antonio, Uvalde & Gulf Railroad near Pulliam (south of Uvalde) and to go in a general northwesterly direction to the Asphalt mines of the Texas Rock Asphalt Company. (R. 84, 121).

Mr. Ponder owns approximately four per cent of the outstanding securities of the San Antonio, Uvalde & Gulf Railroad Company, of which he is Receiver. The balance of these securities are subject to a contract under which Frank Kell and W. T. Eldridge have agreed to buy forty-eight per cent each. They made a payment on the purchase price when the deal was consummated, about June 1st, 1922, and gave notes for the balance. The expense of locating the proposed line was borne by Kell, Eldridge and Ponder. (R. 84, 85). Kell and Eldridge made the contract with the Texas Rock Asphalt Company relating to the construction of the proposed line and Ponder signed as a witness. (R. 120). The capital stock of the Defendant Railway Company is $20,000.00. (R. 122). Of this amount the seven directors subscribed and paid $100.00 each. Mr. Ponder testified:

"The money for the capital stock of the Asphalt

Belt Railway Company was paid in cash. * * * I do not remember the number of dollars that I paid. We, Eldridge and Kell and I, have paid all except the seven shares. It is substantially correct that I paid four per cent of the $19,300.00; it is not exactly in that proportion; we paid for 193 shares. My proportion was not exactly four per cent in this. Yes, **in this my proportion is substantially the same as it is in the securities of the San Antonio, Uvalde & Gulf Railway; and the proportions of Mr. Kell and Mr. Eldridge in this are substantially the same as they are in the securities of the San Antonio, Uvalde & Gulf." (R. 89).**

The petition for condemnation filed by Asphalt Belt Railway Company is signed by Mason Williams, the General Attorney of the San Antonio, Uvalde & Gulf. (R. 23). He represents that Company in this litigation. The Assistant Engineer of the San Antonio, Uvalde & Gulf Railroad helped to locate the proposed line. (R. 84).

The Defendant Receiver applied to the Railroad Commission of Texas to make rates on rock asphalt to intrastate points in Texas from Pulliam, the same as the Southern Pacific makes them from Cline, and the Texas Commission duly issued the order. (R. 88, 124).

Defendant Ponder testified:

"It is a fact that the Asphalt Belt Railway has no office except the offices I occupy as Receiver of the San Antonio, Uvalde & Gulf Railroad. (R. 89).

"So far as I know there have not been any plans made looking to the operation of the Asphalt Belt Railway Company or its line of railroad, nor have any been made looking to the acquisition of the power or equipment for use of that road. * * * It has not been discussed, not to any extent; I don't

remember there being anything said about that at all. I discussed with Mr. Kell or Mr. Eldridge the matter of building this line, and among other things discussed what it would cost, which was an important part of our discussion. The cost of power and equipment was also discussed in connection with the cost of the road—talked about how much power and how many cars we would need. We reached a conclusion that we would have to have a certain number of engines and a certain number of cars. **I couldn't say that provision has been made for money with which to buy that power and equipment;** I don't think it has; we have been getting prices on cars and locomotives too." (R. 89-90).

"It is not a fact that I have thought the San Antonio, Uvalde & Gulf, if it would get the long haul on this traffic, could well afford to furnish what cars were needed for loading on this line; we haven't any cars of our own, not for that business; we have no surplus at all of cars that would be required for this movement. No definite arrangement or contract has been made for purchasing power or equipment; there has been considerable data gotten together on prices of cars and locomotives. The matter of purchasing power or equipment for this line has been discussed in my correspondence with Mr. Kell; he sent me some prices on cars occasionally. With respect to how those cars would be bought, or how the money would be raised,—we talked about the plan of buying them on the car trust plan, so much down and so much thereafter. When cars are bought on the car trust plan, you have to put up a substantial part of the purchase price, about twenty-five per cent. In my opinion as a railroad man, about one hundred cars would be required, in view of my present estimate of the expected traffic, to take care of that situation. It depends how much apiece they would cost; we have been offered

some very good forty ton rebuilt second hand cars at seven, or eight or nine hundred dollars apiece; new cars cost more, running up probably fourteen hundred dollars.

"I have no official position at all with the Asphalt Belt Railroad Company; I just have some stock is all. Yes, I should say I have been active in promoting the construction of that line. I was out on the ground frequently, participating in the survey, locating the road. Yes, I would say **it has been my judgment largely which has directed the location of that line of railroad.** When this condemnation suit by the Asphalt Belt Railroad Company against J. B. Smyth and W. A. Smith was set for hearing before the Commissioners in Uvalde County about two weeks ago, I was there. * * * I had been down there making inspection on my own line for which I am the Receiver, and went from there to Uvalde to attend this condemnation proceeding, and during the evening before this condemnation hearing was set, when a discussion was on between counsel on the two sides looking to a possible postponement of that proceeding, my counsel, Mr. Williams, got in touch with me over the telephone and discussed that matter with me. He asked me what I thought about the postponement, and **I told him I didn't see any use in putting it off**; he said he didn't either; he called me about it, yes, sir. (R. 91-92).

"As to whether any reorganization plans have been worked out by the three of us, Mr. Kell, Mr. Eldridge and I, looking to the reorganization and termination of the receivership of the San Antonio, Uvalde & Gulf Railroad: the Court has been rather anxious that we get out of Court, and we have been trying to finance the thing so as to clean it up; not Kell and Eldridge, but the Milliken Estate which owns the stocks and bonds. It is a fact that **Mr. Kell, Mr. Eldridge and I have been trying to work out some**

**plan to put the San Antonio, Uvalde and Gulf on its feet so it can make its own living and terminate the receivership;** we have been trying to improve the conditon of it. If we hadn't thought we could do that, there would not have been any sense in those gentlemen spending money to get hold of those securities. In terminating this receivership for the San Antonio, Uvalde & Gulf, the thing is to get money to pay the debts. I don't think the Court looks to the matter of getting tonnage to provide the revenue; I think the Milliken people will clean the thing up pretty soon themselves.

"Ever since in 1920 there have been no deficits; there have been surpluses, **not allowing anything for interest on the bonds, however.** I said some time ago that from the beginning and taking the period of Government control, there had been annual deficits of $25,000.00 a year; since the termination of Federal control we have been able to go along and earn operating expenses, except in 1920; we had it ten months in 1920 and had a deficit during those ten months, the ten months immediately following Federal control; but in 1921 and 1922 we earned operating expenses, and have had a surplus ever since, in 1921 of about sixty thousand dollars, and in 1922 considerably less than that, probably twenty-five or thirty thousand dollars; **we barely skinned by in 1922, we paid interest on certificates—Receiver's Certificates, during that time; we paid our taxes, everything except the interest on the bonds, but paid no dividends on stock, and no interest on outstanding bonds.**

"It is a fact that **in order to make the San Antonio, Uvalde & Gulf profitable, we have got to have more business;** and it is a fact that one of the things why Mr. Kell, Mr. Eldridge and I have looked with favor upon this proposition and the building of this additional line out to these rock asphalt mines is that **we hoped to produce additional tonnage for the San An-**

**tonio, Uvalde & Gulf Railroad**; we think the line will pay for itself and also help the San Antonio, Uvalde & Gulf. As to whether my interest in the San Antonio, Uvalde & Gulf has been a larger factor in inducing me to go forward with this proposition than any hope of the road earning extra profits, this Asphalt Belt: I have not thought of it that way; **I thought of it as a whole. I considered the other ownership too, of the securities of the San Antonio, Uvalde & Gulf**; it looked like a good thing for the three of us individually. We have been led to believe that we could get anywhere from twelve hundred to two thousand, maybe three thousand, cars of rock asphalt per annum by the construction of this new line; and we believe it will be a good deal more in a little while; **I look for a minimum of more than twelve hundred cars**, I don't think it will be under twenty-five hundred, which would be **about two hundred cars a month.** I don't remember what the average revenues which would be derived from that traffic by the San Antonio, Uvalde & Gulf Railroad amounted to; it is quite an item. I have figured on that proposition some myself. If I had not made those figures I would not be able to exercise any judgment as to whether or not it would be a paying proposition. I wouldn't want to say what my estimates of the earnings, per car, are on that traffic for the San Antonio, Uvalde & Gulf; it is a matter of divisions with other lines, and I would want to check up on that; I wouldn't want to say off-hand; I have figured it out but I don't recall now what it was; I wouldn't want to say ABOUT what it was. It would be more than ten dollars a car; **it would be something like fifty or sixty dollars per car**, probably, based on the different routes; a minimum of five cents a hundred or $1.10 a ton, probably, to San Antonio. I can not recall all the details now. It was necessarily an estimate because I could not tell where the stuff would go and could not tell whether

the divisions would be on a short haul or a long one; but on forty ton cars, my best recollection now is that **it would probably be forty dollars per car**; our division would be probably five cents per hundred pounds. Now on traffic that would stop along our line, it would be more than that; if it went to Houston or to Dallas, the division would then be only—I estimate it would run from forty dollars per car up. (R. 93-94). But on this estimate of a couple of hundred cars per month, that figures that **we would increase the gross earnings of the San Antonio, Uvalde & Gulf about ten thousand dollars a month, or something like that.**

"A part of the year the trains of the San Antonio, Uvalde & Gulf running South on the Western Division from Uvalde to North Pleasanton, run full tonnage; there is a good deal over half the time they don't. During most of the time the cars of rock asphalt coming over the Asphalt Belt Line into our regular trains would be a fill out, and could be moved very economically.

"Q. So that the net revenues of the San Antonio, Uvalde & Gulf Railroad, for moving this traffic, would be a pretty high percentage of the gross, considering you have to operate these trains over your railroad anyway?

"A. Well, considering the low rate it takes, * * *

"Q. Well, while it takes a low rate there are no claims, or substantially no claims on that business?

"A. It is a good class of business. Yes, it is a very satisfactory business.

"I do not remember of there being any discussion in which I took a part looking to the construction of this line from Pulliam out to the asphalt mines by any other method than that of incorporating a separate railroad for that purpose.

"Q. There was no other plan ever suggested?

"A. Well, **when the plan first came up we thought if we could get the right-of-way out there we might build it out there, as an industry track.**

"Q. **An industry track connected with and to be operated by the San Antonio, Uvalde & Gulf Railroad Company?** (R. 95).

"A. **Probably so later on.**

"Q. Was an effort made to procure right-of-way in order to lay the line along that plan?

"A. Well, I don't think there was much of an effort made until they incorporated the company.

"Q. Now, the San Antonio, Uvalde & Gulf's interests—by which I mean you and Mr. Kell and Mr. Eldridge—have plans on foot for the construction of other lines of railroad, have you not, Mr. Ponder?

"A. Well, we have a plan we would like to carry out. **We now have pending before the Interstate Commerce Commission an application for a Certificate of Public Convenience and Necessity, to construct a line of railroad for a corporation known as the San Antonio & Mexican Railway,** the proposed line of which Company would run between Three Rivers and Fowlerton, and from Fowlerton, down to either Mirando or Laredo. The line from Three Rivers to Fowlerton would approximately make a base for the triangle now made by the two divisions of our line with North Pleasanton as the apex. **The effect of building this line would be that from Fowlerton to Three Rivers it would cut off about fifty miles as against going from Fowlerton to North Pleasanton, and then down to Three Rivers.** In the course of the prosecution of this application for Certificate of Public Convenience and Necessity for the San Antonio & Mexican Railway, I signed a set of answers to questionnaires that the Interstate Commerce Commis-

sion submited to me, as Vice-President of the San Antonio & Mexican Railway Company. The stock of the San Antonio & Mexican Railway Company has not been subscribed by me, Mr. Kell and Mr. Eldridge substantially as I have (R. 96) the stock of this Asphalt Belt Railroad; not the same proportion. I couldn't say how the stock of the San Antonio & Mexican has been subscribed, in what proportions, except I know Mr. Reese Allen, President of it, subscribed for the big end of the stock. It is a fact that in that questionnaire the following question was asked and the following answer given:

"'Q. If the proposed new line of railroad is an extension of an existing railroad, branch connecting track or cut-off, insofar as not fully set forth under paragraphs 15 and 16, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line?'

"'A. While the proposed new line of railroad is to be constructed, owned and operated by a separately incorporated Company, yet **the stockholders of such new railroad, applicant herein, are practically the same as and common with the owners of the S. A., U. & G. R. R., and the new line will be so allied with the S. A., U. & G. R. R. as that new line will greatly facilitate and add to the transportation business of the S. A., U. & G. R. R.,** and it is believed that the new line will accomplish this result to the extent that not only will the new line be a profitable one but so increase the business and earnings of the S. A., U. & G. R. R. as to greatly improve the financial situation of the S. A., U. & G. R. R. and put into a position where it will be financially strong and successful transportation company to such an extent that it will take care of the transportation requirements of the territory served by it. The importance of the construction of the proposed new line as it

shall undoubtedly effect (R. 97) favorably the business and the situation generally of the S. A., U. & G. R. R. is further emphasized in the fact that otherwise **a great doubt exists as to whether or not the S. A., U. & G. R. R. will be able to continue as a transportation line** or whether it must seek an abandonment of its properties.'

"And it is a fact that to a question in that list submitted respecting the character and value of traffic that would probably be interchanged, I made the following answer:

" 'The proposed new line connecting with the Western branch of the San Antonio, Uvalde & Gulf Railroad at or near Fowlerton and with the main line of the San Antonio, Uvalde & Gulf Railroad at or near Three Rivers, would constitute an intermediate line over which, with the completion of a deep sea waterway at Corpus Christi, now provided for and will be under construction shortly, a large line of tonnage would move, originating West of Fowlerton on the rails of the San Antonio, Uvalde & Gulf Railroad and other railroads of Texas destined to Corpus Christi for export, and would likewise be the intermediate line for a large line of tonnage coming through Corpus Christi from the Eastern seaboard destined to points in West Texas. We have reasons to believe that the tonnage so moved would amount to 5000 cars the first twelve months.'

**"In that five thousand car estimate I made in answering the questionaire, consideration was given to this rock asphalt that we expected to produce by the building of this Asphalt Belt Railroad** added to the stuff going to the Gulf Coast via our line that we might get at Uvalde any way on the Southern Pacific without the Asphalt Belt Railway; but we did figure that would add to our business, this line out from Pulliam. (R. 98).

"Q. It is a fact too that the prospective tonnage from these asphalt mines would add greatly to the economies that would be accomplished by building this cut-off?

"A. Well, **the more business going through Fowlerton to Corpus Christi, the more important this cut-off.**

"Q. You would save fifty miles by going through instead of going around: But the point in my question was, **isn't it a fact that you had this prospective rock asphalt tonnage in mind which made you and your associates deem it advisable to apply to the Commission for permission to build the cut-off?**

"A. **Yes, sir,** that increased our estimate, that prospective business we figured on.

"I think it was stated in that questionnaire that the applicant had a tentative agreement with the San Antonio, Uvalde & Gulf Railroad as to divisions on all business originating on or terminating on the new line, as well as all through business traversing the rails of the San Antonio, Uvalde & Gulf Railroad and the rails of the proposed new line. The way it come up that we would make a proposed divisional arrangement with the San Antonio & Mexican and not make one with the Asphalt Belt Railroad was this: one of the principal owners of the San Antonio, Uvalde & Gulf, Mr. Eldridge, was not in favor of going into that extension proposition, and we agreed with him that we would get the permit and build it and let the earnings divide on an operating basis; one of the principal owners of the Uvalde & Gulf was not disposed to engage in that extension. And in order to satisfy his view of the possible unprofitable nature of that construction, this divisional arrangement was made; that if he did not want to go in on (R. 99) it he need not do so, and that when it was built it would be operated and the earnings divided

on a mileage basis,—the earnings I mean; however, that is practically the ordinary way of dividing anyway.

"Since the time of the original surveys which I referred to a while ago, we have paid the men out there for the cost of the surveys that have been made for this proposed line, out of the Receiver's funds and then billed on the other company, and were reimbursed for it all. The Engineer is regularly on the payroll of the San Antonio, Uvalde & Gulf's Receiver; the other men who have done the work were picked up out there; Mr. Benson was hired out there. They were employed and paid by me in the first instance, as Receiver of the San Antonio, Uvalde & Gulf, and I made bill against the Asphalt Belt, or individuals who were promoting it, for reimbursement; this applied to the two men, and the others picked up for that work. They were not paid directly out of the funds provided for the railroad; charged to them, the bills made up, and then I was paid by the Asphalt Belt, and the Asphalt Belt has reimbursed me, as Receiver, for everything. I couldn't say how much money approximately has been spent up to this time on these surveys; all I know about it is what has been paid in; I don't know what has been paid out. Twenty-five thousand dollars has been paid in; twenty thousand dollars was required to pay the capital in full, but there is a deposit of Twenty-five thousand dollars. I don't remember how much was paid out of that money; I can get it; probably one thousand or twelve hundred dollars was the cost of that surveying. Getting the charter, and things of that kind, with the first surveying and all would amount to more than that; it would probably amount to more than twelve hundred dollars. But, anyway, it has all been paid by the people promoting the Asphalt Belt Railway Company, and the Receiver has got nothing against any of them now on the books. (R. 100).

"Q. I asked you this morning, Mr. Ponder, about whether a differential would be charged in the movement over this Asphalt Belt Railway in addition to the charge to or from Pulliam. You stated you were uncertain about that. To refresh your recollection, or does this contract refresh your recollection in that respect, by providing that the contractors,—that is, Kell and Eldridge, shall secure an order from the Texas Railroad Commission which will equalize the freight rates from the quarry or quarries of the Asphalt Company to all points in Texas with rates on the same class of material from the station Cline on the Southern Pacific line, to all points in Texas, and that the Asphalt Company shall not be required to commence construction of the eight miles to its mine or deposit the estimated cost thereof to be expended by the contractors for that purpose until such order is secured. Does that set you straight about whether a differential was to be charged over the Asphalt Belt?

"A. No, I don't think that makes any difference, I think,—we have not got that order yet, haven't applied for it, as I understand it." (R. 102).

By the contract above referred to the contractors, Kell and Eldridge, agreed to:

"Secure an order from the Texas Railroad Commission which will equalize the freight rates from the quarry or quarries of the Asphalt Company to all points in Texas with rates on the same class of material from the station Cline on the Southern Pacific line, to all points in Texas; and that the Asphalt Company shall not be required to commence construction of the eight miles to its mine or deposit the estimated cost thereof to be expended by the contractors for that purpose until such order is secured." (R. 115).

Mr. Ponder also testified:

"I stated this morning that taking the Asphalt Belt Railway and the San Antonio, Uvalde & Gulf together, I thought it would be a good thing for the promoters. I think taking the Asphalt Belt as an independent proposition, it could be operated at a profit if they could get the volume of business we hope to get. A few commodities inbound such as food and supplies and the like going to the commissary of the Texas Rock Asphalt Company, and this rock asphalt which will move outbound, is about all the business that can be expected over that line; there might be a few scattering shipments of live stock and something else, but that would be bulk of it. Those inbound shipments might move in what we would call way car or L. C. L. shipments, might move in box cars or caboose, way car. The equipment which moved in the loads might not move back out empty; there might be some wood or something of that kind to be loaded out. But in most instances, if it went in in box cars, the probabilities are the majority would come out empty; would be very little of that, though. These cars that the asphalt would come out in, practically all of those going in the mine would go in empty; so that as a practical result our empty car mileage would be substantially as large as our loaded car mileage, about the same. As to whether our expense of operation would be increased in that regard: we would have to haul the empties in. Other expenses of operating a line of that kind would include salaries of a train crew, track crew and an agent; that would be about all. I don't know that a staff of general officers would draw any salaries. I did not state that the officers of the San Antonio, Uvalde & Gulf will perform the same services for this little company insofar as it needs them; Mr. Kell, Mr. Eldridge and myself might in a supervisory way direct the operation of that line

without our being out any salary, or being out any money, or very little time, but so far as the officers of the San Antonio, Uvalde & Gulf are concerned, they wouldn't do it gratis. We would not necessarily have to have a traffic man on a little line fifteen miles long, where there is no competitive business at all; I wouldn't want a traffic man. As to whether we would have to have a man to keep our rates up and prepare new rates and go to these meetings: that is very simple; when you have got a commodity going to move out, the people on the other line will be glad to get part of it.

"Mr. Kell, Mr. Eldridge and I have an option to buy all the outstanding securities of the San Antonio, Uvalde & Gulf Railroad.

"Yes, sir, I have been operating railroads for several years.

"Q. Do you think that a railroad company serving a substantial traffic could possibly operate, even though it tried to do so, without moving and handling interstate and foreign shipments in view of the complexities of the business in this day and time, bearing in mind now in answering that question the declarations of the courts with which you are no doubt familiar, that the local billing does not necessarily control the situation, but that the situation is controlled by the intention of the parties to the shipment at the time the shipments move?

"A. I think so. I don't think the interstate traffic that line would have would amount to anything." (R. 103-105).

Mr. J. B. Smyth testified at the hearing as follows:

"My name is J. B. Smyth. I reside in Bexar County, Texas. Mr. W. A. Smith, the other individual complainant, resides in Jefferson County, Texas. The Uvalde Rock Asphalt Company is a Texas

Corporation, with its principal office under its charter in Beaumont, Jefferson County, Texas. I am one of the defendants in the condemnation suit that has been instituted in Uvalde County by the Asphalt Belt Railway Company. W. A. Smith and myself own the land described in the petition in the condemnation suit pending in Uvalde County, subject to some mineral rights of the Uvalde Rock Asphalt Company, so that the three of us together own complete title to it. Starting along the route described in this condemnation suit indicated by the maps of the Asphalt Belt Railway Company, at the northwest terminus of that line, and going eight miles, I think that would carry us about two miles through our land, on the Smyth Estate lands, go through ours. The last eight miles of this proposed line includes all of the land that is described in this condemnation suit. I was served with notice of this condemnation suit, and appeared out there before the Commissioners about two weeks ago tomorrow, and at that time the Commissioners postponed the hearing until tomorrow—in other words, gave us two weeks postponement. The lawyers for the plaintiff in that case and Mr. Ponder indicated they intended to proceed as rapidly as they could with that condemnation suit; wouldn't give us any time at all. Mr. Ponder was in our office one day talking to Mr. Doyle and I about the construction of a railroad from Pulliam out into that general territory, through or by our mines, but the exact time I don't know; I am sure it was just before the incorporation of the Asphalt Belt Railway, but he didn't at any time mention any Asphalt Belt. They did not mention at that time anybody building except the San Antonio, Uvalde & Gulf. Prior to the incorporation of this Asphalt Belt Railway Company, J. R. Hanby, of Denison, for Mr. Kell, of Wichita Falls came to Beaumont to see me—the morning of the 5th. Mr. Hanby never once mentioned the Asphalt Belt Railroad; he said Mr. Kell

and the Sausage, by which I mean the San Antonio, Uvalde & Gulf. This rock asphalt that is under our premises shows on the surface in some places; others we have got to core drill to find it; majority of the places it lies below the surface—it does in a few places. Its deposits are not uniform either in size or shape or thickness; they are all sizes and all shapes and all depths. The same deposit varies in thickness in different places, from 18 inches to 20 or 40 feet, just take it right down. This proposed right of way which is described in this condemnation suit passes over deposits of this rock asphalt on our land; I know that by coring it, and it shows on the surface. Coring on the right of way, we have got two tests made, and it shows on the surface on part of it, and it is a point of the country we know what is usually under it. We have drilled two test holes on this right of way; Mr. Smith there has a log of the two test holes. They use a diamond core drill in drilling these holes; it is according to the depths of that hole, might dig a hole through gravel, and have to use two more men, use a driller and two helpers. There is no other way to discover whether this stuff is under the ground, because if you drill anything else it just chews it all up. It has been costing us 80, 85, and $1.00 a foot to drill these core drill holes; where we have got gravel to dig, it costs us about $1.15.

"I am President of the Uvalde Rock Asphalt Company.

"That conversation I had with Mr. Hanby was on the morning of the 6th, the day when this condemnation suit was filed out in Uvalde County." (R. 106-108).

In the answer of the Defendant Railway Company, adopted by its co-Defendants, it was alleged that the mines or quarries of the Texas Rock Asphalt Company,

to which this line of railroad is proposed to be extended, have no outlet to any railroad transportation, and mined products must be hauled by trucks to a railroad (R. 35); and in their joint supplemental answer they alleged that Kell, Eldridge and Ponder have until June 1, 1927 within which to pay for the securities of San Antonio, Uvalde & Gulf Railroad, for which they have contracted. (R. 44).

This is the state of the pleadings and the proof upon which the Appellants contend that the Court erred in failing to hold that the proposed line of railroad will, in truth and in fact, constitute a mere extension of the existing line of road owned by the Defendant San Antonio, Uvalde & Gulf Railroad Company and operated by its Receiver.

If it be borne in mind that the Defendant Railroad Company has its properties in the hands of a Receiver and that its corporate franchises are consequently in a state of suspended animation, no stronger case could be conceived of its identity with another corporation in the eyes of the law. Under the circumstances, it could not well amend its charter and build a branch line. Whether what has been done is the result merely of a desire to avoid that difficulty or of a further desire to evade the provisions of Paragraph (18) of Section 1 of the Inter-State Commerce Act is immaterial in this case. If actualities are to count for anything, it must be obvious that if this proposed line is built and put in operation we will have, to all practical intents and purposes, an ex-

tension of the San Antonio, Uvalde & Gulf Railroad. These companies have the same stockholders; they have the same offices; the incorporators, directors and officers of the Asphalt Belt Railway Company are, each and all, employes of the Defendant Receiver. Such arrangements as have been made respecting rates for this new traffic have been made on the application of the Defendant Receiver. Such traffic as the proposed line will produce will necessarily pass over the rails operated by the Receiver. The original plan was for the Receiver to build an industrial track to procure this traffic. Mr. Ponder's estimate of the earnings of the San Antonio, Uvalde & Gulf to be derived from that traffic fixes the amount at $40.00 per car, and he estimates that there will be about two hundred cars per month, which would increase his gross earnings as Receiver about $10,000.00 per month, a great part of which would be net revenue because of the economy with which the traffic could be hauled.

Mr. Ponder had previously expressed the opinion to the Interstate Commerce Commission, in order to secure a certificate with respect to another line, that there was great danger that the San Antonio, Uvalde & Gulf Railroad Company might be obliged to seek an abandonment of its property if its financial condition could not be improved. The expected tonnage which he told the Commission he thought would be moved over that other line included the tonnage to be derived from the proposed line involved here. Mr. Ponder stated frankly that in order to make the San Antonio, Uvalde & Gulf Railroad Com-

pany profitable he had to secure more business. He did not look upon the construction of the Asphalt Belt Railway Company as an independent venture from which he and his associates would make an independent profit.

> "I thought of it" he said "as a whole. I considered the other ownership too, of the securities of the San Antonio, Uvalde & Gulf; it looked like a good thing for the three of us individually. We have been led to believe that we could get anything from twelve hundred to two thousand, maybe three thousand, cars of rock asphalt per annum by the construction of this new line; and we believe it will be a good deal more in a little while; I look for a minimum of more than twelve hundred cars, I don't think it will be under twenty-five hundred, which would be about two hundred cars a month." (R. 93, 94).

Can it be said in the light of this showing that these stockholders, or potential stockholders of the San Antonio, Uvalde & Gulf, have subscribed for stock in the Asphalt Belt Railway Company as an independent venture? Can it be said that they hope to make a profit out of that corporation **in the ordinary way?** Is it not rather true that they are confessedly interested in the new Company, because of its connection with the old; because of its promise to revive the old, and that while they **hope** that the new company will be independently profitable that is plainly not the controlling motive for their investment in its securities?

We respectfully submit that the proof showed beyond question that the proposed line will be, as the Complainants have alleged, a mere extension of the existing

line of the San Antonio, Uvalde & Gulf and that its construction is therefore being proceeded with in violation of law, in view of the admission by the Defendant Asphalt Belt Railway Company, in its answer (R. 32) that it has not applied for or obtained the requisite certificate, and in view of the adoption of that answer by the Defendant San Antonio, Uvalde & Gulf Railroad Company (R. 27) and by the Defendant Ponder, Receiver (R. 30).

Even if we assume, for the purpose of the argument, that the proposed line is not and will not be a mere extension of the line now owned and operated by the Defendant Railroad Company and its Receiver, it is plain that the construction of it will nevertheless violate the Act, in that it is, within the terms and spirit of the law, "the construction of a new line of railroad." It will also be apparent, upon a consideration of the Texas Statutes, entering into and forming a part of the charter of the Defendant Asphalt Belt Railway Company, that said Defendant not only "shall engage in transportation under this Act, over or by means of such additional or extended line of railroad," but that it must do so, or violate its charter obligations, which we may assume it will not be heard in this Court to proclaim.

We pass now to a consideration of the question whether the Asphalt Belt Railway Company, in view of its charter and its charter obligations, is such a carrier as may not, under paragraph (18) of Section 1 of the Interstate Commerce Act, construct its line of railroad without first ob-

taining a certificate of public convenience and necessity from the Interstate Commerce Commission.

Paragraph (18) of Section 1 of the Interstate Commerce Act has heretofore been copied in full. It must be observed that this paragraph prohibits construction in the absence of a certificate by a carrier by railroad subject to this act. The question, therefore, arises: What carriers by railroad are subject to the Interstate Commerce Act. Under Paragraph (1) of Section 1 of that act it is stated that the provisions of the act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory—in short, to common carriers engaged in the transportation of passengers or property by railroad in interstate or foreign commerce. Is the defendant Asphalt Belt Railway Company such a common carrier? That defendant solemnly asserts that it does not intend to engage in interstate or foreign commerce but we assume that if by its charter it is obliged to engage in such commerce and to transport and carry the same, it will not be heard to assert that it intends to violate those obligations or to be recreant to the laws which gave it life.

For the convenience of the Court we here copy the following articles of the Revised Statutes of Texas, all of which were in force when said defendant was incorporated and all of which, under the laws of this State, entered into and became a part of the charter of said defendant, to-wit, Articles 6588, 6608, 6609, 6610 and 6611:

> "Art. 6588 (4518) (4235) Shall carry U. S. mails, and compensation therefor.—Every such corporation shall, when applied to by the postmaster-general, convey the mail of the United States on its road or roads; and in case such corporation shall not agree as to the rate of transportation therefor, and as to the time rate of speed, manner and condition of conveying the same, it shall be lawful for the governor to appoint three commissioners, who, or a majority of them, after fifteen days notice in writing of the time and place of meeting, to the corporation, shall determine and fix the prices, terms and condition aforesaid; but such price shall not be less for conveying such mails in the regular passenger trains than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the postoffice car; and in case the post-master general shall require the mail to be carried at other hours, or at a higher speed than the passenger train be run at, the corporation shall furnish an extra train for the mail and be allowed an extra compensation for the expenses and wear thereof, and for the services to be fixed as aforesaid. (P. D. 4903).

That the United States mails go to and from every State in the Union is a matter of such common knowledge as to be judicially known to the Court. Especially since

the establishment of the system of parcels post has the postal system been engaged in interstate and foreign commerce, because since that time it not only transmits intelligence relating to such commerce but actually transports and delivers supplies and other articles which plainly constitute commerce. But even if it were not for the parcels post the mail is plainly an instrumentality of interstate commerce and is such commerce itself. It is a matter of common knowledge that it contains catalogues from which selections are made that ultimately result in shipments moving in interstate commerce; it contains orders, confirmations of sale, shipping instructions, checks and drafts for the payment of goods shipped in interstate commerce. The point is so plain to us that no mention would be made of it were it not for the fact that counsel in argument asserted the contrary. One of the plainest answers to the contention of counsel is that in its simplest form the mail is a medium of communication, so are telegraphs and telephones, and, by Section 1 of the Interstate Commerce Act, telegraph and telephone companies doing business between interstate points are subjected to the act to regulate commerce. This is an express declaration by Congress that the business of such companies is interstate commerce and how much the more must be the business of the postal system, which not only transmits intelligence, but as well, the merchandise to which the intelligence relates. The other articles referred to above are as follows:

> Art. 6608. (4523) (4251) To receive freights and passengers from connecting lines.—All railway com-

panies doing business in this state shall be and they are hereby required to receive from all other railway companies with which they may connect at the state line of this state, or at any place within this state, or at any or all places where they may cross the line of any other railway doing business, or operating a line of railway, in this state, all freights and passengers coming to it from such connecting lines and destined to points on its line, or to points beyond its line or any other line or railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received, and upon the same terms and conditions with those made by such line for like or similar service against any other railway in or out of this state with which it does business; provided, however, that the words, 'without delay or discrimination,' as used herein, are hereby declared to mean that the freight received for transportation as herein required shall be shipped in the order in which it is received, giving preference in all cases to live stock and other perishable freight in the order received; and the charges for the business required by this article to be interchanged shall be no greater prorata per cent per mile for freight, and no greater rate per mile for passengers and baggage, than is charged to any other line for transporting like freight and passengers and baggage, or that it accept for itself when transported wholly on its own line, no matter on what part of the line or in what direction the transporting is done.

Art. 6619. (4536) (4252) What are connecting lines.—Whenever any two or more railroads doing business in this state shall connect with each other by crossing each other's tracks or otherwise so as

to form a continuous or connected line from one point in the state to another point in this state, such lines so crossing are hereby declared to be connecting lines; and when such connecting lines receive from any other railway or transportation line passengers or freight for transportation over the combined line at a rate or division agreed upon between themselves and such other railway or transportation line from which the business is received as aforesaid, then, in every such case, it shall be the duty of such connecting railways forming such through line, and of either or both of them, to receive from every other railway or transportation line with which they or either of them may connect by crossing of track or otherwise, all passengers or freight that may be destined to points on either of the lines making up such combined line, and transport the same to the point of destination, if on such combined lines, or either of them, or to the next connection or crossing in the direction of the destination of such freight or passengers, without delay or discrimination, and at no greater rate than is paid, and on the same conditions as is or shall be required by such combined line for like or similar services from any other railway or transportation line with which they or either of them shall interchange business.

Art. 6610. (4537) (4253) Terms for receiving, etc.—Every railroad, or person, or corporation operating a railway for the carriage of freight and passengers in this state shall receive freight, passengers and baggage for transportation to or into this state, or through any part thereof, from every other connecting railway upon the same terms and conditions as to the division of charges for carrying or transporting the same upon a mileage, or any other basis, and upon terms and conditions as to bills of lading, way-bills, tickets, coupon tickets and baggage checks, that any such person, or corporation or transportation line may receive or contract to re-

ceive from any other person or corporation engaged in like business in this state; and, where railroads within this state receive goods for transportation into their warehouse or depots, they shall forward them in the order in which they are received, the first received to be the first forwarded, without giving the preference to one over another; and in case of failure to do so they shall be liable for all loss occurring while the goods remain, and for all damage occasioned or in anywise resulting from delay; provided, that the trip or voyage shall be considered as having commenced from the time of the signing or bill of lading, and as having ended upon the arrival of freight at point of destination, and written notices served upon the consignee that it is ready for delivery upon payment of freight and charges; provided further, that should the consignee of the goods fail to receive them promptly after such notice is served the liability of the railroads thereafter shall be the same as that of warehousemen.

Art. 6611. All water craft freight to be received on same terms.—All railway companies doing business in this state shall be and they are hereby required to receive from all steamships, steamboats and other water craft and vessels, at their usual places for receiving such freights at the several ports on the coast of Texas, and on the inland waterways in this state, all freight and passengers coming to it from such steamships, steamboats and other water craft and vessels, and destined to points on its line, or to points beyond its line, or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line or to the connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against such steamship line, steamboat owner or company, or the owner of any other water craft or other vessel from whom such freight or passengers

> are received, and upon the same terms and conditions with those made by such railway company for like or similar service with any other person, steamship company, steamboat company or owners, or any other water craft or vessel, with which it does business at such points or stations as aforesaid.

The articles just quoted make it so plain that it is the duty of Texas Railroad corporations to handle interstate and foreign commerce, and any other kind of commerce which may be offered for transportation, whether by individual shipper or connecting carrier, that argument to make their meaning clear is difficult. If there were nothing else in these articles of the Texas Statutes to convince us that a Texas railroad corporation is obliged to handle interstate commerce, the provisions of Article 6611, relating to traffic received from and delivered to water craft, taken in connection with the provisions of the preceding article, obliging all connecting carriers to receive and transport all freight and passengers offered, would be sufficient. The article relating to water craft is a part of an act adopted in 1899. This Court judicially knows that in 1899 there was practically no traffic to and from the ports on the coast of Texas by water craft which was not either interstate or foreign commerce. The Morgan and Mallory Steamship Lines had then been operating into Galveston for many years, and it can not be conceived that the members of the Texas Legislature at that time were ignorant of the character of traffic moved by steamship lines of that character, yet by this article of the statute all railway companies

touching the ports were required to receive from such steamships "all freights and passengers coming to and from such steamships * * * and destined to points on its line or to points beyond its line." If the destination was to some point beyond its line it was obliged to carry it to the next connecting carrier and that connecting carrier was obliged under Article 6609 to transport it either to destination or to the second connecting carrier.

In short, the articles of the statute to which we have referred are so plain, so unambiguous and so mandatory that the conclusion can not be escaped that a Texas railroad corporation is obliged by the terms of its charter to transport interstate and foreign commerce.

But counsel assert that if this railroad company refrains from publishing or concurring in through routes and joint rates applicable to interstate commerce, it can thereby escape the provisions of what is, to this corporation, the fundamental law. Counsel seem to be laboring under the misapprehension that unless property moves across state lines under through billing, it is not interstate commerce and that its interstate character ceases at the point where the process of through billing ends. In support of that contention counsel cite the Social Circle Case (**C. N. O. & T. P. vs. Interstate Commerce Commission,** 162 U. S. 184, 40 L. Ed. 935, in which shipments were made from Cincinnati, Ohio, to Atlanta, Augusta and Social Circle, points in the State of Georgia and they quote the following statement in the opinion:

"It may be true that the Georgia Railroad Company

> as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit themselves to the provisions of an act of Congress even when carrying. between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that Company could undertake such transportation free from the control of any supervision except that of the state of Georgia."

Counsel, however, neglect to inform us whether or not this corporation of the State of Georgia was "legally compelled to submit itself to the provisions of the Act of Congress," that is, so compelled by the laws of the State of Georgia where it was created. The decision of the case was pitched upon the proposition that **whether or not** there was this legal compulsion under the laws of Georgia the Company had **elected** to enter into the carriage of interstate freights and had therefore subjected itself to the control of the commission.

The Asphalt Belt Company, as a corporation of the State of Texas, being compelled by the laws of that State to carry interstate and foreign commerce, it owes the duty to its patrons and to the public to do whatever is necessary in the way of filing tariffs or schedules to enable it to comply with that obligation. What was said in the above quoted portion of the opinion in the Social

Circle Case does not conflict with the more recent decisions of the Court as to what constitutes interstate commerce. It is true that goods which have been brought into this State may subsequently be shipped within this State in intrastate commerce but the development of the law relating to interstate commerce since the decision of the Social Circle Case has been rapid and of vast proportions. It is only necessary, in view of the contentions of counsel, regarding local billing and through billing, to refer the Court to the recent case of **B. & O. vs. Settle**, decided by the Supreme Court of the United States November 13, 1922, and reported in the advance sheets of December 1, 1922 (43 Sup. Ct. Rep. 28). In that case it appeared that the Railway Company had freight stations at Oakley and at Madisonville, both within the City limits of Cincinnati. It published, in connection with other carriers, interstate rates on lumber from southern points to both these stations and also published intrastate rates from Oakley to Madisonville. The interstate rates to Madisonville were higher than the interstate rates to Oakley plus the local rate from Oakley to Madisonville. The defendants in error were in the lumber business at Madisonville. They had lumber shipped from the south to Oakley, paid the freight at that point, received at that station delivery of the loaded cars on the team tracks or in the bulk yard, and, without unloading any of the cars, reshipped them within a few days to Madisonville on local bills of lading, paying the local freight rate. The Railway Company sued them to recover the difference between the amounts

actually paid and the amounts which would have been collected upon the application of the through interstate rates to Madisonville. The Court said:

> "That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; Railroad Commission of Louisiana vs. Texas & Pacific Ry. Co. 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215. And in Baer Bros. Mercantile Co. vs. Denver & Rio Grande R. R. Co., 233 U. S. 479, 490, 34 Sup. Ct. 641, 58 L. Ed. 1055, this court held that a carrier cannot, by separating the rate into its component parts, charging local rates, and issuing local waybills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.
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> "If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley, and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley, and that the rebilling to Madisonville was an afterthought. But the defendant Clephans admitted at the trial that it was intended from the beginning that the cars should go to Madisonville, and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars, Oakley was to be merely an intermediate stopping place, and the original intention persisted in was carried out. That

the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, **the intention as it was carried out determined, as matter of law, the essential nature of the movement, and hence that the movement through to Madisonville was an interstate shipment;** for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment, and when the intention with which a shipment was made is in issue the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. * * *

"Before the decisions above referred to it was commonly assumed that, while a carrier, or one of its employes, might not act as a reconsigning agent for a shipper, in order to enable him to use a combination of lower intermediate rate, and thus avoid the higher charges incident to the through interstate movement, the shipper might so use the combination, provided he consigned the car to himself at the intermediate point, there paid the charges, took possession and then reshipped the car on the local rate to its real destination. The distinction made was without basis in reason. * * * And, since the decisions cited above were rendered, the principle there declared has been steadfastly applied by the Interstate Commerce Commission. * * *

"The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate,

may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges. The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out."

The conclusions announced by the Court in the Young case (**S. P. Terminal Co. vs. I. C. C.**), in the **Worthington Case**, and in the **Sabine Tram Case**, all of which are cited in the Settle case, are so well known to the Court that it would seem to be superfluous to refer to them at greater length than is required in the statement that they completely explode the theories of these Defendants as to the controlling force of local billing in determining whether or not a shipment is interstate or intrastate.

Counsel also cite as controlling the case of **Southern Railway Company vs. Reid,** 222 U. S. 424, 32 Sup. Ct. Reporter, 140. In that case the Railway Company, a Virginia Corporation operated a line of railroad through the State of North Carolina. Mrs. Reid tendered to it a shipment of household goods consigned to a point in West Virginia beyond its line of road, offered to pay the freight and demanded a through bill of lading to a named consignee. The Railway Company had no rates on file with

the Interstate Commerce Commission covering such movement and therefore declined to receive the shipment and declined to name a rate for the transportation of the goods and declined to receive payment of the charges and to issue a bill of lading. Six days later the Company, having established and published a through rate applicable to the movement, received the freight, collected the charges in advance and issued the bill of lading. Mrs. Reid thereupon sued the Railway Company under the statute of North Carolina for a penalty of $50.00 per day for the delay in receiving and shipping the freight. The Supreme Court of the United States reversed a judgment of the State Court in favor of Mrs. Reid and held that the State Statute was in direct conflict on a matter of interstate commerce with the Act to Regulate Commerce, in that the latter obliged all carriers subject to the act to regulate commerce to furnish transportation between interstate points "upon reasonable request therefor." It was, therefore, properly decided that a State statute upon the same subject matter prescribing penalties for a failure to accept goods for interstate transportation, without any pervious request at all, was void because Congress had entered the field of legislation and its regulations had superseded all regulations of the State upon the same subject matter. The same conclusion was reached by the Court upon the same grounds in **Southern Railway Company of Indiana vs. Railroad Commission of Indiana**, 236 U. S. 439, 59 L. Ed. 661, and by the Court of Civil Appeals at Austin in the case of **State of Texas vs. Orange & Northwestern Railroad Company.**

181 S. W. 494, in both of which cases it was held that state safety appliance acts had to give way before the Federal Act.

The situation, however, with respect to the Asphalt Belt Railway Company is this: That corporation was created under the laws of the State of Texas. It was plainly within the province of the State of Texas to grant or to withhold the right to create corporations, or to grant the right upon any conditions which it might see fit to impose. The people of this and other states are interested in the movement of interstate and foreign commerce as much as or more than they are interested in the movement of local commerce. For instance, the State of Texas would be paralyzed if no means were provided of moving its annual cotton crop to the markets in other states and countries. No steel or iron in considerable quantities could be had for the construction of buildings or railroads if it could not be moved in from Alabama, Pennsylvania and other producing states. Its production of oil and any other commodities including rice and lumber are vastly in excess of the capacity of the local markets. The Federal Congress has never undertaken to authorize the creation under general laws of Federal railroad corporations and only a few have ever been created under special acts, such as the Union Pacific and the Texas Pacific. Congress has plainly left it to the states to provide corporate instrumentalities by which the business of transporting interstate commerce is to be conducted and the State of Texas has therefore rightly and wisely

said, in effect, to railroad corporations created under those laws, that they may not undertake the business of transportation by railroad unless they undertake the business in its entirety including, state, interstate and foreign traffic.

When Congress asserted, as it did in the Act to Regulate Commerce, that no carrier by railroad should engage in interstate commerce without filing its tariffs, publishing its rates, making reports and keeping its accounts, as provided in that act, those requirements of Congress did not operate to relieve the railroad companies of Texas from their obligation to handle interstate and foreign commerce. The two sets of requirements are not in conflict. One may and must be read in connection with the other so that the requirement of the Texas Statute now is that a railroad corporation organized under those statutes must not only engage in interstate commerce but must do all these things which the Federal laws require as conditions of engaging in such commerce.

The power of a state to impose liabilities and obligations upon a corporation of its own creation has long been recognized by the Supreme Court of the United States. Recently, in the case of **International & Great Northern Railroad Company vs. Anderson County,** 246 U. S. 424, 38 Sup. Ct. Rep., 370, the Court said:

> "We should be slow to say that it was not within the power of a state legislature dealing with a corporation of the state to fix the place of its domicile and principal offices in the absence of other facts than those appearing in this case. But furthermore

when the office-shops act was on the statute book the plaintiff in error took out a charter under the general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not have otherwise affected those particular corporations, it was a law upon the statute books and was far from a mere nullity and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error can not complain. Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. We agree with the State Courts that the condition was imposed.

"The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one."

It is likewise true in this case that the articles which have been quoted above were on the statute books when the defendant Asphalt Belt Railway was incorporated, and being under the laws conditions of its incorporation it can not complain if they require it to engage in interstate commerce.

The situation in this case is therefore substantially different from that before the Court in **Southern Railway vs. Reid.** There the State of North Carolina sought to impose, under the sanction of a penalty, certain obligations upon a Virginia corporation which did business in the State of North Carolina, with respect to its conduct of interstate commerce. These obligations related to subject matter upon which the Congress had already legislated,

and the State act therefore could not stand. Here, the State of Texas, which has created this corporation, has written into its charter an obligation to perform an interstate service for the benefit of the people of Texas. The Congress has never entered that field of legislation and has never authorized the creation of interstate railroads having a general obligation to perform an interstate service, but has plainly left to the states the matter of making provision for corporations to perform that public service. So long as the State and Federal acts can be read together, permitting both to stand, there is no necessity for annulling either.

Counsel and the Court below laid great stress upon the decision of the Supreme Court in the Eastern Texas Railroad Case, 258 U. S. 204, the Court saying that that case "is ample and conclusive authority for the proposition that under the facts of the case at bar, and under the law applicable thereto, the Asphalt Belt Company is not a carrier subject to the provisions of the Interstate Commerce Act." (R. 81). Both the Court and Counsel have overlooked the fact that the people of Texas and their Legislature are the sole and exclusive judges of the purposes for which corporations may be formed under the laws of that State; that the laws of the State of Texas do not provide now, and never have provided, for the creation of a railroad corporation with powers and duties limited strictly and solely to the handling and movement of intrastate traffic within the State of Texas. The Defendant Asphalt Belt Company is not that character of corporation, first

of all because by its charter it has acquired all of the powers and duties of a regular standard railroad corporation, and, secondly, because the laws of the State of Texas do not provide for the incorporation of any other kind of railroad corporation. Its charter, consisting in part of the statutes of the State, make it beyond question an interstate carrier. It can no more evade the power conferred upon it by the State than the duties and responsibilities which go with it.

It may be conceded, for the purpose of argument, that if the laws of Texas provided for the incorporation of a purely intrastate railroad corporation, the Commission would have no power, nor would there be any necessity, to issue to such a company a certificate of public convenience and necessity in view of the decision of the Court in the Eastern Texas Railroad Case. But until the Legislature of Texas enacts a law, valid under the Constitution of that State, authorizing the incorporation of such Company, the decision in the case referred to will have no application.

So far as concerns the proof made upon the application for Preliminary Injunction, it may be recalled that the Bill of Complaint and the several amendments thereto were duly verified; that there were no denials under oath of any of the averments of the Bill, and that the only denials contained in the answers were mere general denials in violation of Equity Rule No. 30 and therefore not sufficient to put the facts in issue, and certainly insufficient to destroy the effect as proof of the allegations of

the verified bill. **Bay Shore Investment Company vs. Palmer**, 284 Fed., 979.

We respectfully submit that the District Court erred to the prejudice of these Appellants in each and every respect pointed out in the Specifications of Error hereinabove contained; that the decree entered below should be reversed and the cause remanded for trial upon the merits and that, pending the trial upon the merits, an Interlocutory Injunction should issue out of and under the seal of this Honorable Court restraining the construction of the proposed railroad and, as incidental thereto, the prosecution of the condemnation suit now pending in the County Court of Uvalde County, Texas, in terms as prayed for. For this and for such other relief as this Honorable Court may deem appropriate in the premises, the Appellants respectfully pray.

T. W. GREGORY,
FRANK ANDREWS,
ROBERT H. KELLEY,
Solicitors for Appellants.

**"EXHIBIT A."**

"Art. 6421. Any railroad company may, by its original articles of incorporation, or by its amendments to its charter, project and provide for the locating, constructing, owning and operating of branch lines from any points on its main line, or from any points on its branch line, constructed or projected, to any other points making an angle of at least twenty-five degrees in the general course from the main line, if the branch commence from the same, or from the branch line, if it commence at a point on the same; provided, that the same may commence at the terminus of a branch line and continue in its general course; and may, by amendment to its charter, provide for the continuation in its general course of the main line; that any and all amendments of charters, acts or articles of incorporation approved by the attorney general of the state, or his lawful representative, by which any branch railroad or railroads has or have been constructed in accordance with the provisions of this article as herein provided are authorized, validated, sanctioned and confirmed to the same extent as though this article had always read as now amended."

"Art. 6504. If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate, or the material thereon, required for the purpose of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, for the construction of reservoirs for the water supply, or for the right-of-way, or for a new or additional right-of-way, for change, or relocation or road bed, to shorten the line, or any part thereof, or to reduce its grades, or any of them, or for double tracking its railroad or constructing and operating its tracks, which is hereby authorized and permitted or for any other lawful purpose connected with or necessary to the build-

ing, operating or running its road, such corporation may acquire such property in the manner provided in this Chapter; provided, that the limitation in width prescribed in Article 6484, Revised Statutes, 1911, shall not apply to real estate, or any interest therein, required for the purposes herein mentioned, other than right-of-way, and shall not apply to right-of-way when necessary for double tracking or constructing or adding additional railroad tracks, and that real estate, or any interest therein, to be acquired for such other purposes, or any of them, need not adjoin or abut on the right-of-way; provided, further, that no change of the line through any city or town, or which shall result in the abandonment of any station or depot, shall be made, except upon written order of the Railroad Commission of Texas, authorizing such change; and provided, further, that no railroad corporation shall have the right under this Act to condemn any land for the purposes mentioned in this Article situated more than two miles from the right-of-way of such railroad corporation; and provided, further, that nothing herein shall be construed to repeal or limit the provisions of Section 1, Chapter 93 of an Act passed at the Fourth Called Session of the Thirty-fifth Legislature approved April 13, 1918."

"Art. 6505. No railroad company shall enter upon, except for a lineal survey, any real estate whatever, the same being private property, for the purpose of taking and condemning the same, or any material thereon, for any purpose whatever, until the said company shall agree with and pay the owner thereof all damages that may be caused to the lands and property of said owner by the condemnation of said real estate and property, and by the construction of such road."

"Art. 6506. If such company and said owner can not agree upon the damages, it shall be the duty of said company to state in writing the real estate

and property sought to be condemned, the object for which the same is sought to be condemned, the name of the owner thereof and his residence, if known, and file the same with the county judge of the county in which such property, or a part thereof, is situated; provided, if the owner resides in either county in which a portion of the land is situated, the same shall be filed in the county of his residence."

Art. 6507. (Provision in case County Judge disqualified.)

"Art. 6508. Upon the filing of such statement, the county judge shall forthwith, either in term time or in vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed on between said corporation and said owner."

"Art. 6509. The said commissioners shall be sworn by the county judge, or by any officer authorized by law to administer oaths, to assess said damages fairly and impartially and in accordance with law."

"Art. 6510. Said commission shall, without delay, appoint a day and place for hearing said parties; and the day appointed shall be the earliest practicable day, and the place selected for such hearing shall be as near as practicable to the property in controversy, or at the county seat of the county in which the property is situated."

"Art. 6511. The commissioners shall issue a notice in writing to each of the parties, notifying them of the time and place selected for the hearing."

"Art. 6512. Said notice shall be served upon said parties at least five days before the day of hearing, exclusive of the day of service, and shall be served by delivering a copy of the same to the party, his agent or attorney, and may be served by any person competent to testify."

"Art. 6513. The person making such service shall return the original notice to said commissioners, or any one of them, on or before the day set for the hearing, with his return in writing thereon, stating how and when the same was served."

Art. 6514. (Service on Estates of minors or deceased persons.)

Art. 6515. (Service on non-resident or unknown owner.)

"Art. 6516. When service of notice has been perfected, the commissioners shall, at the time and place appointed, or at any other time and place to which said hearing has been adjourned, proceed to fully hear said parties; but, if upon the day set for the hearing, the service of notice has not been perfected the said hearing shall be postponed from time to time until such service has been perfected."

"Art. 6517. Said commissioners for the purpose mentioned in this chapter shall have power to compel the attendance of witnesses and the production of testimony, and to administer oaths and punish for contempt as fully as is provided by law for the district or county court.

"Art. 6522. When the said commissioners shall have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due to the owner of such real estate, if any be found to be due, and shall date the same and sign it, and shall file the said assessment, together with all other papers connected with the case, with the county judge without delay."

"Art. 6523. Should the said commissioners, or either of them, from any cause be unable or fail to act as such, the county judge may at any time appoint another commissioner or commissioners to

supply the place or places of those who are unable or who fail to act."

"Art. 6525. The railroad company seeking to condemn property shall defray all expenses of serving notice upon the owner of such property, but shall be entitled to recover said expenses from such owner in case it shall be decided that said owner shall pay the costs of the proceeding."

"Art. 6526. The commissioners may adjudge the costs against either party, and shall make out a statement in writing of all the costs which have accrued before them, and shall state therein against which party the said costs have been adjudged, and shall sign the same and deliver it, with the other papers of the cause, to the county judge."

"Art. 6527. If either party be dissatisfied with the decision of such commissioners, he may, within ten days after the same has been filed with the county judge, file his opposition thereto in writing, setting forth the particular cause or causes of his objection; and thereupon the adverse party shall be cited, and said cause shall be tried and determined as in other civil causes in said court."

"Art. 6528. If no objections are filed to such decision within the time prescribed in the preceding article, the county judge shall cause the said decision to be recorded in the minutes of his court, and shall make the same the judgment of said court, and may issue the necessary process to enforce the same."

"Art. 6529. The costs of the proceedings before the commissioners and in the court shall be determined as follows; to-wit: If the said commissioners shall award greater damages than the said company offered to pay before the proceedings commenced, or if objections are filed to the decision in the county court under the provisions of this chapter, and the

judgment of the court is for a greater sum than the amount awarded by the commissioners, then the said company shall pay all costs; but if the amount awarded by said commissioners as damages, or if the judgment of the county court shall be for the same or less amount of damages than the amount offered by the company before proceedings were commenced, then the costs shall be paid by the owner of the property."

"Art. 6530. In no case shall such corporation be entitled to enter upon and take the property condemned, without first having paid whatever amount of damages and costs may have been awarded or adjudged against it by such commissioners, or deposited money to cover the same in the court wherein such condemnation proceedings are pending. But if the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

FIRST. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

SECOND. In addition thereto, it shall deposit in said court a further sum of money equal to the amount of the damages awarded by the commissioners, and which shall be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further

costs that may be adjudged against it, either in the court below or upon appeal.

THIRD. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if he has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

"If the cause should be appealed from the decision of the county court, the appeal shall be governed by the same law as in other cases; except the judgment of the county court shall not be suspended thereby. The rules hereinbefore laid down for governing railroad corporations shall likewise apply to all persons and corporations having the right of eminent domain."

"Art. 6534. Whenever the right of way has been acquired, as hereinbefore provided, the judgment of the court shall vest such right in the company so acquiring the same."

(14)

Office Supreme Court, U. S.
FILED
JAN 20 1925
WM. R. STANSBURY
Clerk

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1924.**

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## No. 206.

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J. B. SMYTH ET AL., APPELLANTS,

*vs.*

ASPHALT BELT RAILWAY COMPANY ET AL.

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**BRIEF FOR THE APPELLEES.**

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R. J. BOYLE,
G. W. WHARTON,
MASON WILLIAMS,
J. D. WHEELER,
*Counsel for Appellees.*

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## BRIEF FOR THE APPELLEES.

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The statement of the case as made by the appellants in their brief is substantially correct.

In the beginning of the brief the appellants state that the "error of the Court in dismissing the bill came about by reason of the fact that he overlooked the well-established principle that a motion to dismiss admits, at least for the purposes of the motion, all the facts well pleaded in the bill of complaint, and that the Court failed to give effect, in his consideration of the motion to dismiss, to the facts pleaded in the bill and considered only the facts proved at the hearing of said motion for interlocutory injunction."

The record shows that in neither hearing did the Court pass on the motion to dismiss in the beginning of the pro-

ceeding, but held it in abeyance until he had heard the pleadings, the evidence, and argument of counsel. In other words, until after the appellants had developed their full case.

We submit that under these circumstances the rule relied upon by appellants has no application, and that when parties agree, tacitly or otherwise, to such a proceeding the Court, in passing on the whole case to ascertain whether or not it has jurisdiction, has a right to "consider the facts" proved at the hearing.

Jurisdiction is the first question for the Court to consider, and if there had been no motion to dismiss and the Court, after hearing the evidence of appellants, had concluded that it was without jurisdiction, it would have been its duty, of its own motion, to dismiss the bill.

It would be a vain and foolish thing to reverse a case on the rule relied on by appellants when the record showed that appellants had fully developed all the testimony they had, and this testimony showed a lack of jurisdiction in the district court.

The record as to what happened at the trial discloses the following:

The first hearing was on July 30, 1913, and the interlocutory order entered at such hearing, omitting the formal parts, is as follows:

> "Came on to be heard the above styled and entitled cause upon the original and supplemental complaints of the complainants, J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, and the motion to dismiss as well as the original and supplemental answers of the defendants, Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf Railroad Company, and

A. R. Ponder, receiver of the properties and assets of said San Antonio, Uvalde & Gulf Railroad Company; and the Court having heard the pleadings of the parties, the evidence introduced, and the argument of counsel, is of opinion that this Court is without jurisdiction in this cause.

"It is therefore ordered, adjudged and decreed:

"*First.* That said application for injunction be and the same is hereby denied, and the temporary restraining order heretofore issued in this cause is hereby dissolved.

"*Second.* That, subject to the right of complainant to further amend their bill of complaint within ten days from this date, if they be so advised, leave thereto being hereby granted, said bill of complaint as now amended shall be and the same is hereby dismissed.

"*Third.* That no part of this order shall be held to prejudice the right of complainants to make a further application for a temporary injunction on such further amendment, if any, as they may file within the time aforesaid, or to raise and assert in the condemnation proceedings, mentioned in said bill, any of the questions raised herein or to defend such proceeding on any ground mentioned in said bill as amended.

"To all of which complainants excepted and gave notice of appeal" (Record, pp. 45-46).

The Court will please note that the case came on to be heard upon the original and supplemental complaints, the motion to dismiss, the original and supplemental answers of the defendants, "*and the Court, having heard the pleadings of the parties, the evidence introduced, and the argument of counsel,*" held that it had no jurisdiction.

This shows clearly that, without objection on the first hearing, the Court passed the motion to dismiss, to be considered with the whole case.

At the second hearing "came on to be heard the application for injunction on complainants' original bill and the first and second amendments thereto, and the Court, having heard the pleadings, evidence, and the argument of counsel, is of opinion that the Court is without jurisdiction, and that the defendants' motion to dismiss the bill and the amendments should be and the same is hereby granted" (Record, p. 69).

This clearly shows that, without objection on the second hearing, the Court passed the motion to dismiss, to be considered with the whole case.

Again, in the memorandum opinion filed by the District Judge, it is stated that on July 30th the suit was dismissed for lack of jurisdiction; that plaintiffs were allowed to amend *"and a further hearing and resubmission of the whole matter was had on August the 24th"* (Record, p. 73).

These references are sufficient to show that appellants can not be serious in their contention that the Court was in error in considering evidence, but that he should have confined himself solely to the allegations of the bill.

The brief of appellants contains six main subdivisions, the first five of which are confined exclusively to the discussion of the pleadings in order to show that on the face of the pleadings the Court had jurisdiction, and that, therefore, regardless of the evidence, the case should be reversed on account of equity rule 29, above referred to.

We think we have conclusively shown that equity rule 29 does not apply in this case, and hence these five subdivisions

become immaterial and are "excess baggage" in the unusually long brief filed by appellants.

These subdivisions in the brief do not seem to bear much, if any, relation to the specifications of error filed in the Court below; however, we will discuss each one separately in as short a space as possible.

No. 1 is devoted exclusively to attempting to show that the complainants in the original bill are "parties in interest" within the purview of the act.

It is true appellees raised the question of appellants being "parties in interest," but the Court overruled this contention and heard the case on the merits.

The District Judge, in the memorandum opinion, says:

> "Since the plaintiffs' right to injunction rests upon provisions of an act of Congress regulating interstate commerce, the Court would be without jurisdiction unless the facts show (1) that the Asphalt Belt Railroad Company is owned and controlled by the San Antonio, Uvalde & Gulf Railroad Company, an interstate carrier, thus constituting it an extension and branch of the latter road, or (2) that the A. B. Company is obligated by law and its purpose is to carry on business as an interstate carrier" (Record, pp. 73-74).

Thus it is clearly seen that the trial court held that the appellants were "parties in interest" and placed the want of jurisdiction on two other distinct grounds, neither of which is discussed in subdivision 1 of appellants' brief. We deem it unnecessary further to discuss subdivision 1.

Subdivision 2 attempts to show that the Court had jurisdiction on account of the allegations in the bill and the supplements thereto.

As previously stated, the Court below held that he was without jurisdiction because of the two questions of fact which were resolved against appellants. It is, therefore, unnecessary further to discuss subdivision 2, as the Court's ruling on these facts is nowhere questioned in said subdivision.

Subdivision 3 states that the bill showed a good cause for injunction under paragraph 20 of Section 1 of the Interstate Commerce Act.

The want of jurisdiction, according to the Court, resting upon the two questions of fact, both of which were resolved against the appellants, this subdivision of the brief has no application to any supposed error committed by the lower Court.

Subdivisions 4 and 5 assert the proposition that the proceedings for condemnation are a part of the proposed construction, and that, therefore, such proceedings should be enjoined, regardless of Section 265 of the Judicial Code. As this interesting discussion is purely academic and cannot possibly have any bearing on whether or not the Court committed error in passing on the two questions of fact, which he considered controlled the jurisdiction, we will pass the matter by.

The sixth and last subdivision asserts that "in view of the pleadings and the evidence the Court below erred in refusing to issue the preliminary injunction as prayed for." This is the only place in the brief where the sufficiency of the evidence is questioned, and we will point out to the Court some of the evidence sustaining the finding of the lower court.

We understand it to be the universal rule that the findings of fact of the lower court will not be disturbed by the

appellate court unless the evidence clearly shows that there is no sufficient basis for such findings.

The controlling questions of fact, according to the District Judge, are, first, Is the Asphalt Belt Railroad Company owned and controlled by the S. A., U. & G.; and, second, is the Asphalt Belt Railway Company obligated by law and is it its purpose to carry on business as an interstate carrier? (Record, pp. 73-74.)

As to the first:

The San Antonio, Uvalde & Gulf Railroad Company is in the hands of a receiver appointed by the trial court, and it has been in the hands of a receiver for many years, and A. R. Ponder is the receiver (Record, p. 83).

Mr. Ponder testified that he had an interest for quite awhile in the outstanding securities of the S. A., U. & G. Railroad Company, and that Mr. Kell and Mr. Eldridge have a contract for certain interests, and if the contract is carried out Mr. Kell will have 48 per cent and Mr. Eldridge 48 per cent; that he did not acquire his interest at the same time they acquired theirs; they came in later and bought an option; that he was one of the original holders of securities, and that, in effect, he will continue his place in the list of stockholders and bondholders practically as he originally had; that his stock is paid for, and that the stock of Kell and Eldridge is not; that they made a payment on the purchase price when the deal was consummated and gave notes on which there has been no payment except interest.

That there was a contract made between the Texas Rock Asphalt Company and Mr. Kell and Mr. Eldridge relating to the construction of the Asphalt Belt Railroad and the

financing of the cost of construction; that the matter of constructing this railroad to reach the mines of the Texas Rock Asphalt Company was first brought up to him a couple of years ago; that he did not consider the matter much at first because he could do nothing as receiver or as an individual, but after the other gentlemen became interested he laid the matter before them (Record, pp. 85-86).

That the parties to this contract to build the Asphalt Belt Railway are the Texas Rock Asphalt Company, Mr. Kell and Mr. Eldridge; that he was not a party to it in his individual capacity, though he expects to be interested in the railroad if it is built; that at the time the contract was made it was not made for the benefit of Kell, Eldridge, and himself, as the arrangement had not been completed that he would come in on this new line; that no kind of contract had been made by him as receiver of the S. A., U. & G. and the Asphalt Belt Railway Company relating to the divisions of revenues on traffic to move over the two lines" (Record, p. 87).

That he had not thought of what basis of rates would be applied from the northwestern terminus of the proposed line; that he got an order from the Texas Railroad Commission to make the rates from Pulliam (on the S. A., U. & G) the same as they are from Cline to Texas points, and that this order of the Texas Railroad Commission did not apply to the Asphalt Belt Railway; that he applied to the Texas Railroad Commission to make rates to intrastate points in Texas from Pulliam the same as the Southern Pacific rates from Cline (Record, p. 88).

That the directors of the Asphalt Belt Railway Company have elected officers, and that H. P. McMillan is president (Record, p. 88).

That each of the incorporators of the Asphalt Belt Railroad Company had subscribed for some of the stock, but Mr. Kell, Mr. Eldridge, and himself have subscribed for a majority of the stock; that each of the incorporators has the stock and it is in their names, and, so far as he knows, they own the stock and paid the money individually; that the money was not furnished by Mr. Kell or Mr. Eldridge or himself (Record, p. 89).

That so far as he knows there have been no plans made looking to the operation of the Asphalt Belt Railway Company, and that it is not a fact that it is his intention or the intention of his associates that power and equipment would be furnished to that line under lease or some other kind of contract by him as receiver of the S. A., U. & G.; that he discussed the cost of building of the railroad with Mr. Kell and Mr. Eldridge, and that the cost of power and equipment was also discussed in connection with the road, and that they talked about how much power and how many cars would be needed; that they have been getting prices on cars and locomotives too; that it is not a fact that he thought the S. A., U. & G., if it could get the long haul on this traffic, could well afford to furnish what cars were needed for loading on this line; that the S. A., U. & G. has no cars of its own for that business; that they have no surplus at all of cars that would be required for this movement (Record, p. 90).

That he does not remember of there being any discussion looking to the construction of this line from Pulliam out to the asphalt company's mines by any other method than that of incorporating a separate railroad for that purpose (Record, p. 95).

It was agreed between counsel that the Texas Rock Asphalt Company has been in operation for about two years and never has sold any asphalt outside of the State of Texas (Record, p. 109).

"The COURT: How long has the Texas Rock Asphalt Company been in active operation?

"Mr. WILLIAMS: Two years.

"The COURT: To what extent, in approximate figures, what amount of tonnage have they been moving to market?

"Mr. BOYLE: Handle from 30,000 to 35,000 tons a year.

"The COURT: Is that asphalt company—is that tributary to the Southern Pacific Company at Cline?

"Mr. BOYLE: All of that stuff is teamed to Cline, and shipped from Cline.

"The COURT: I notice there is a spur there.

"Mr. BOYLE: The spur at Cline runs to the Uvalde Rock Asphalt Company's mine?

"The COURT: Yes, sir.

"Mr. BOYLE: The Southern Pacific runs to the Uvalde Rock Asphalt Company. The Texas Rock Asphalt Company has no rails of any kind; all of its business has been teamed to Cline and from there shipped over the Southern Pacific.

"The COURT: How far do they team it?

"Mr. BOYLE: Team it about eight miles.

"The COURT: The particular purpose, then, of this line, whether it be public, private, or unlimited, is for the purpose of reaching the asphalt mines of the Texas Rock Asphalt Company?

"Mr. BOYLE: Yes, sir.

"The COURT: All right. And do I understand it is the purpose of the Texas Rock Asphalt Company

and of the Asphalt Belt Railway Company to limit their business operations to intrastate traffic?

"Mr. BOYLE: Yes, sir.

"Mr. WILLIAMS: Strictly."

(Record, pp. 109-110.)

It will thus be seen from the testimony that there is ample evidence to support the findings of fact made by the lower court to the effect that the Asphalt Belt Railway Company is not owned or controlled by the S. A., U. & G.

The authority of the Court in so holding needs no further support than the case decided by this Court and cited by the trial court—Georgia, S. & F. Railway Company *vs.* Georgia Public Service Commission, 289 Fed., 878.

Peterson *vs.* Chicago, R. I. & P., 205 U. S., 364.

As to the second grounds—that is, is the Asphalt Belt Railway Company obligated by law, and is it its purpose to carry on business as an interstate carrier?

Its pleadings allege that it has no intention of doing an interstate business. It is building to the Texas Rock Asphalt Company's mines, which have been in operation for two years, and the testimony above quoted shows that said asphalt mines have never sold a pound of asphalt outside of the State of Texas.

We think there can be no question but that there are railroads which are not subject to the Interstate Commerce Act.

The language of the act conclusively shows that, in the opinion of Congress, there are carriers to which said act does *not* apply. The act begins, Section 18: "After ninety days after this paragraph takes effect no carrier by railroad, *subject to this act*" shall construct a railroad, etc., without getting

a certificate from the Interstate Commerce Commission. And, again (latter part of Section 18), it is said: "And no carrier by railroad, *subject to this act*, shall abandon all or any portion of its line," etc. (Italics are ours.)

If Congress had not recognized that there *are* carriers by railroad *not* subject to the Interstate Commerce Act, of which the Transportation Act is merely an amendment, then this language would not have been used. It would have said "No carrier by railroad" shall do thus and so, because the words "subject to this act" would have been superfluous.

Likewise the Supreme Court of the United States recognizes that there are carriers that are not subject to the Interstate Commerce Act.

In Texas *vs.* Eastern Texas Railroad Company, 258 U. S., at page 213, Mr. Justice Van Devanter, in speaking of these sections of the Transportation Act, says:

> "Like the act of which they are amendatory, these paragraphs are specially restricted to the carriers engaged in transporting persons or property in interstate and foreign commerce."

The Reid case (Southern Ry. Co. *vs.* Reid, 222 U. S., 430) likewise holds that there are carriers not subject to the Interstate Commerce Act, and the railroad company was sustained in its refusal to accept an interstate shipment of freight, even though the statutes of North Carolina have similar provisions to the statutes of Texas, commanding any common carrier to accept any freight destined for any point.

In the matter of the application of Duluth and North Minnesota Railway Company for a certificate of public convenience and necessity, 71 I. C. C. Reports, 795, the Commission said:

> "It is further contended, both by the attorney general and the protestants, that if the paragraphs in question apply to a road located wholly within a state, they are unconstitutional and void, because beyond the power of Congress to enact. Since the briefs were filed, however, the Supreme Court of the United States has interpreted paragraphs (18) to (20), inclusive, of Section 1, and has held that, as interpreted, they are valid. Texas *vs.* Eastern Texas R. R. Co. *et al.*, decided March 13, 1922. This decision establishes that Congress could and did authorize us to sanction the discontinuance of interstate and foreign commerce on a line of railroad located wholly within one State and operated by a corporation of that State which does not operate any line of railroad extending through more than one State. It follows that the effect of our certificate in this case was to permit the applicant herein to abandon interstate and foreign commerce, leaving the question of continued operation for intrastate service to be disposed of in other proceedings."

Having, then, determined, both by the act under consideration and by the decisions of the Supreme Court, that there are carriers by railroad not subject to the Interstate Commerce Act and, therefore, not subject to these provisions thereof, let us investigate the authoritative definition of such carriers.

It seems to us that we find the definition of such a carrier clearly stated in the Eastern Texas Railroad case above cited. Mr. Justice Van Devanter says:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line."

Is that not a complete definition of the Asphalt Belt Railway Company?

And the Court then says that the Commission has no authority over the discontinuance of purely intrastate business of a road such as the one described above.

But counsel urge, with vehemence, that the Asphalt Belt Railway Company, when constructed, will be required to accept any shipments destined to or coming from any point, and they rely on Revised Statutes of Texas, Article 6588, requiring railroads to carry United States mails, and Articles 6608 and 6610, requiring railroads to receive and forward all freight tendered to them by their connections or patrons.

These articles of the statutes were passed between 1883 and 1887, and the Interstate Commerce Act was passed in 1887 and has been amended many times since that date.

These articles of the statutes, relied on by counsel, have to do with the shipment of freight and passengers in interstate and foreign commerce, as well as intrastate commerce. In so far as they affect only intrastate shipments, they are perfectly valid and binding on the carriers, but in so far as they affect interstate and foreign commerce they are not valid if they contravene any act of Congress having to do with this particular phase of interstate and foreign commerce.

That proposition is so clear that it is useless to cite authorities.

Take, for instance, the Reid case above cited (222 U. S., 430). The statutes of North Carolina, which the Court will find set out in the margin of the opinion, is very similar to the articles of the statute relied on by counsel in this case.

Mr. Justice McKenna, in the Reid case, held that these statutes of North Carolina were inoperative and reversed a

judgment of the Supreme Court of North Carolina penalizing the railroad for not accepting an interstate shipment.

See also

Erie R. R. *vs.* N. Y., 233 U. S., 671.

Western Union Telegraph Co. *vs.* Voeglin, 251 U. S., 315.

Caizek *vs.* Western Union, 272 Fed., 227.

Can anything be clearer than that these articles of the statute are inoperative in so far as they apply to interstate commerce?

The Interstate Commerce Act provides that no carrier shall ship goods in interstate commerce unless and until through or joint rates have been established between the two points and such rates have been filed with the Interstate Commerce Commission.

Under the Reid case, could a Texas railroad be penalized for refusing an interstate shipment when it had not complied with this provision of the Interstate Commerce Act?

Likewise could the Asphalt Belt Railway Company, when constructed, be penalized for refusing to accept an interstate shipment when it had complied neither with the above provision of the Interstate Commerce Act nor with the provisions of the Transportation Act requiring a certificate of convenience and necessity?

These provisions of the Interstate Commerce Act render nugatory the articles of the Texas statutes relied on by counsel in so far as said articles of the statutes relate to interstate and foreign commerce.

There are roads in existence recognized by the Transportation Act and by both the Interstate Commerce Commission

and the Supreme Court as not coming under the provisions of said Interstate Commerce Act. Cannot another one be created under the sovereign power of the State of Texas?

The proposition upon which counsel for plaintiff in this case rely to sustain their contention that the Asphalt Belt Railway Company, defendant, is an interstate carrier and, as such, subject to the provisions of the amendment to the Interstate Commerce Act, commonly known as the Transportation Act of 1920, is this: That the charter granted to the Asphalt Belt Railway Company by the State of Texas and the laws of the State of Texas authorize and require the Asphalt Belt Railway Company to engage in Interstate Commerce.

In the case of Gibbons *vs.* Ogden, 9 Wheaton, page 1, opinion by Mr. Chief Justice Marshall, the provision of the Constitution of the United States granting to the Congress of the United States the power to regulate interstate commerce is first construed, and it is there held that this power is exclusive, and that the several States have no power or authority over interstate commerce. Subsequently this decision was modified by our Supreme Court to the extent that the several States have a right to exercise authority on some subjects of interstate commerce (such subjects being within the police power of the several States) in the absence of any legislation by Congress, but that whenever Congress exerts its paramount authority over such subject the power of the State ceases to exist, and all State regulations in conflict with the Act of Congress are struck down.

Prior to 1887 the Congress of the United States had not exercised its authority over interstate commerce by railroad, but since that time, by repeated amendments to the Interstate

Commerce Act, has extended its authority over interstate commerce so as to define all duties and obligations of carriers by railroad engaged in interstate commerce, and by the amendment of 1920, known as the Transportation Act, has provided that no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act, over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

While it may be true that prior to Federal legislation on the subject the carriers by railroad within the State of Texas, or any other State, could have been required by the laws of the State of Texas to engage in interstate commerce, action by Congress destroyed the possibility of such assumption, since such action renders the State impotent to deal with the subject over which it had no interest, but only permissive power.

The contention, therefore, of counsel for plaintiff that at the time of the incorporation of the Asphalt Belt Railway Company (1923) the charter and laws of the State of Texas

both authorized and required such railroad to engage in interstate commerce is untenable, since the statutes of the State of Texas, to which plaintiff refers, have no application to interstate commerce. For instance, counsel for plaintiff cites Article 6588 of the Revised Statutes of Texas, providing for the transportation of United States mail by railroads, and providing that in the event the railroad company is unable to agree with the Postmaster General on the charge for this service, the Government shall appoint three commissioners to fix the price and terms on which they shall handle such mail. United States Statutes 7478 and 7523 contain elaborate and detailed regulations covering the transportation of mail by railroad, which provisions conflict with the statute of the State of Texas referred to, and it would be absurd to contend that a railroad company could assert the right to handle mail in accordance with the provisions of the Texas statute and contrary to the provisions of the Federal law referred to.

Articles 6608, 6609, and 6610 of the Revised Statutes of Texas undertake to define the terms and conditions under which railroads in Texas shall interchange business, and Articles 405, 416, 418, and 419 of the Interstate Commerce Act fix and define the terms and conditions under which interstate carriers shall interchange business.

Article 6711 of the Revised Statutes of Texas undertakes to provide for the interchange of traffic between railroads and water carriers, while the Congress of the United States, since the passage of that State statute has made full provision for the interchange of traffic between interstate rail and water carriers.

In fact, it will be found upon examination that every statute of the State of Texas which counsel for plaintiff has

cited as requiring a railroad chartered under the laws of the State of Texas to engage in interstate business has been superseded by subsequent enactments by the Congress of the United States defining the rights, duties, and obligations of interstate carriers with reference to all of these matters.

As is said by the Supreme Court of the United States in Southern Railway Company *vs.* Reid, 222 United States, 425, referring to the scope of the Interstate Commerce Act:

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

The fact that the Interstate Commerce Act prohibits any carrier to engage in interstate commerce until tariffs have been filed and published, as provided in that act, being the expression of the paramount authority over interstate commerce, is in itself sufficient to demonstrate that any State laws undertaking to require carriers to engage in interstate commerce are by the force of this provision stricken down.

The contention raised by counsel here was in effect raised in the Reid case and sustained by the State courts, where a carrier was subject to penalties for refusal to accept an interstate shipment under a State statute which levied a penalty for refusal of a railroad company to accept any shipment offered it for transportation. We quote from the opinion by the Supreme Court in passing on that case the following:

> "The question is, where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is

demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed and published designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See Robinson *vs.* Baltimore & O. R. R. Co., 222 U. S., 506; *post*, 288; 32 Sup. Ct. Rep., 114. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

"We cannot assume that it was without consideration of its necessity that Congress enacted Sec. 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem—Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one

> time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulations be not exclusive, this situation is presented: If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved, and there is given to the States the power which is the States' and to Congress the power which belongs to Congress."

As is suggested by the Supreme Court in that case, if a State statute can require a carrier to engage in interstate commerce contrary to the provisions of the Federal law, the situation would be presented that if a carrier refused to engage in interstate commerce, as required by the State law, and contrary to the provisions of the Federal law, the carrier would be subject to State penalties, and, on the other hand, if the carrier engaged in interstate commerce in conformity with the State law, and contrary to the provisions of the Federal law, the carrier would be subject to Federal penalties.

This question was again presented to the Supreme Court of the United States in the case of Chicago, Rock Island & Pacific Railway Company *vs.* Hardwick Farmers Elevator, 226 U. S., 436 (57 L. Ed., 284), where a carrier was subject to a penalty for failure to furnish freight cars demanded to be used in interstate traffic, the penalty being fixed by a State statute, and the State statute was held by the Supreme Court of the United States to have no application to interstate commerce. Mr. Chief Justice White, delivering the opinion of the court, says:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate-commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive, power. Southern Railway Company *vs.* Reid, 222 U. S., 434; 56 L. Ed., 257; 32 Sup. Ct. Rep., 140."

The question has been before the Texas courts on many occasions as to whether or not State statutes regulate interstate transportation by railroads, and in every case where Congress in the exercise of its paramount authority over interstate commerce had legislated on the particular subject, our Texas courts, following the decision of the Supreme Court of the United States, have held the State statutes inoperative as to interstate commerce. We cite said cases as follows:

G., C. & S. F. Ry. Co. *vs.* Gray, 87 Texas, 312.
S. A. & A. P. Ry. Co. *vs.* Bracht, 172 S. W., 1116.

A., T. & S. F. Ry. Co. *vs.* Smyth, 189 S. W., 70.
Miller *vs.* Goodwin, 91 Texas, 41.
State *vs.* G., H. & S. A., 184 S. W., 678.
Woessner *vs.* Cotton, 47 S. W., 227.
Western Union Telegraph Co. *vs.* Schoonmaker, 181 S. W., 263.
M., K. & T. Ry. Co. *vs.* Fookes, 40 S. W., 858.
Western Union Telegraph Co. *vs.* Smith, 188 S. W., 702.

More recently the Congress of the United States, by the Act of 1910, undertook to control the interstate business of telegraph companies, and in the case of Postal Telegraph Company *vs.* Warren-Godwin Lumber Company, 251 U. S., page 27 (64 L. Ed., 251), the Court passed on the State statute invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeated message, which statutes had been applied to the case of an interstate message, and it was held that Congress having exerted its authority to bring under Federal control the interstate business of the telegraph company, there was, therefore, an occupation of the field by Congress which excluded State action.

To the same effect in Western Union Company *vs.* Voeglin, 251 U. S., 315 (64 L. Ed., 281), opinion by Mr. Chief Justice White, where the court said:

> "We are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no

> room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred, therefore, in imposing the penalty fixed by the State statute."

Counsel for plaintiff present the novel theory that, notwithstanding the State law imposes upon all railroads incorporated under the laws of the State of Texas the duty to engage in interstate commerce, that we seek to assert the right to avoid the obligation imposed upon us by the laws of the State of Texas by contending that we can do so by refraining from publishing and filing tariffs as required by the Interstate Commerce Act. Such is not our position. In the first place, we deny most vigorously, and the authorities cited sustain our position, that there is no law of the State of Texas which authorizes or requires the Asphalt Belt Railroad to engage in interstate commerce; that, on the contrary, the State of Texas could only authorize, and has only authorized, the Asphalt Belt Railroad to engage in intrastate commerce; that Congress, being the paramount authority over interstate commerce, and having legislated on the subject of interstate commerce, or, in other words, having occupied the field of legislation on that subject to the exclusion of the several States, the Asphalt Belt Railroad could not acquire the right or authority to engage in interstate commerce except by complying with the provisions of the act of Congress on the subject of interstate commerce, which requirements are so numerous that it would be a useless waste of the Court's time to set them up here.

Counsel devotes a great part of his brief to a discussion of what constitutes interstate commerce, but that is beside the

question. The fact remains that the Federal Government has fixed the terms and conditions under which a carrier by railroad may engage in interstate commerce, and no State legislation to the contrary has any force or effect. If the Asphalt Belt Railway Company should undertake to engage in interstate commerce by reason of State statutes which have no application to interstate commerce, and contrary to the provisions of the Interstate Commerce Act, which is the expression of the paramount authority on the subject, the Asphalt Belt Railroad would be subject to the severe penalties imposed by the Act to Regulate Commerce.

If the contention of counsel for plaintiff in this case is tenable, that corporations incorporated under the laws of the State of Texas are required by laws of the State of Texas to engage in interstate commerce, then we are confronted with the absurd situation that the Legislature of the State of Texas has destroyed the powers vested in the State of Texas by the Federal Constitution and the Constitution of the State of Texas to regulate intrastate commerce, since if no corporation can engage in transportation within the State of Texas without engaging in interstate commerce, no corporation can engage in the transportation business in Texas until it has met the requirements of the Interstate Commerce Act.

Clearly it was not the intention of the Congress of the United States to invade the powers of the several States over intrastate commerce. The Interstate Commerce Act itself specifically provides that it shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, in interstate commerce, and the act specifically provides that it shall not apply to the transportation of pas-

sengers or property, or to the receiving, delivering, storing or handling of property, wholly within one State. Again, in subdivision 17 of Section 402, the act says:

> "*Provided, however*, that nothing in this act shall impair or affect the right of a State in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

The certificate of convenience and necessity provisions are found for the first time in the Interstate Commerce Act in the amendment of 1920, paragraphs 18, 19, and 20 of Section 402.

Section 18 provides that ninety days after this paragraph takes effect, "no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate, etc."

Clearly the Asphalt Belt Railroad is not the extension of a line of railroad subject to the Interstate Commerce Act, neither is it a railroad subject to the Interstate Commerce Act undertaking the construction of a new line of railroad. It cannot become a railroad carrier subject to the act until it complies with all of the provisions of the Interstate Commerce Act necessary to enable it to lawfully engage in interstate commerce. We respectfully submit that the purpose and intention of the carrier is an essential and vital

matter. If the carrier has just been incorporated and has not constructed its line of railroad or engaged in any business, and has not filed any tariffs with the Interstate Commerce Commission, or met any of the other requirements for engaging in interstate commerce, it is clearly not subject to the Interstate Commerce Act, and if this avowed purpose and intention cannot be inquired into by a court, prior to its actually engaging in business, to ascertain whether it is or is not its purpose and intention to engage in interstate commerce, then clearly in the case of a railroad, such as the one at bar, chartered for the purpose of being constructed wholly within one State and not having engaged in business, the Court must hold that it is not a carrier subject to the Act to Regulate Interstate Commerce.

Again, on the question of the purpose and intention of the carrier being a potent inquiry, we submit that the provision of the law for an application for a certificate of convenience and necessity by a carrier subject to the Interstate Commerce Act which intends to construct a new line of railroad, clearly contemplates that the carrier must in this application declare its purpose and intention to engage in interstate commerce; otherwise the Interstate Commerce Commission would have no jurisdiction of its application, since its authority is limited to carriers engaged in interstate commerce, and we submit further that if a carrier should make an application to the Interstate Commerce Commission for a certificate of convenience and necessity and declare its purpose and intention not to engage in interstate commerce, but to confine itself to intrastate business, the Interstate Commerce Commission would have to dismiss the application for want of jurisdiction, since it has no power over in-

trastate carriers and its authority is confined to carriers engaged in interstate commerce.

The question of whether or not the certificate-of-convenience provisions of the Interstate Commerce Act have application to intrastate carriers was before the Supreme Court of the United States in the case of The State of Texas *vs.* Eastern Texas Railway Company, originally tried in this same district court. While it is true that case involved an abandonment question, the provisions of the law with reference to certificates of convenience and necessity apply alike to abandonment and new construction. We quote from the opinion of the Court as follows:

> "The only matters in controversy are whether, by paragraphs 18, 19 and 20, Congress has assumed to clothe the Commission with authority to sanction the entire abandonment of a road such as this, and, if so, whether the power of Congress extends so far.
>
> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce.
>
> "As a whole, these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be inci-

dental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. Minnesota Rate case (Simpson *vs.* Shepard), 230 U. S., 352, 418; 57 L. Ed., 1511, 1549; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann Cas. 1916 A, 18; Railroad Commission *vs.* Chicago, B. & Q. R. R. Co., 257 U. S. 563; *ante,* 371; 42 Sup. Ct. Rep., 232. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such, independently of
is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

The Eastern Texas Railroad was engaged in both interstate and intrastate business, and if the statutes of the State of Texas quoted by counsel for plaintiff as requiring the Texas railroad to engage in interstate business have any force and effect to that end, then clearly the Interstate Commerce Commission could not have authorized the Eastern Texas Railway to abandon interstate business. Furthermore, if it be true, as contended by counsel for plaintiff, that a railroad corporation cannot engage in intrastate business without at

the same time engaging in interstate business, then the certificate of the Interstate Commerce Commission authorizing the Eastern Texas Railway Company to abandon interstate business, and the decision of the Supreme Court of the United States that its certificate must be construed as properly authorizing the Eastern Texas Railroad to abandon interstate business, mean nothing.

Counsel for appellants devote a great deal of their brief to a discussion of the proposition that the construction and operation of the Asphalt Belt Railroad without a certificate of convenience and necessity would mean that such railroad would, by reason of the inadequacy of its earnings, constitute a burden on the interstate commerce, but this question is well met and disposed of by the Supreme Court of the United States in the Eastern Texas case. A railroad located wholly within the State and engaged solely in intrastate business cannot, by any shortage in its earnings, become a burden on interstate commerce. Its operation in intrastate commerce would be purely a matter of local concern, and its earnings could bear no relation to, or in any manner affect, interstate commerce.

The suggestion has been made that while it is the purpose and intention of the Asphalt Belt Railroad to engage in intrastate commerce only, that a shipment originating at some interstate point might at some time, through reconsignment and local billing, be handled by the Asphalt Belt Railroad, and for that reason the Asphalt Belt Railroad should be held to be a carrier engaged in interstate commerce and subject to the Interstate Commerce Act. Such a holding would be in effect amending the Interstate Commerce Act to provide that no railroad shall be constructed in the United States,

whether subject to the Interstate Commerce Act or not, without obtaining a certificate of necessity, thereby destroying the rights of the several States to promote, incorporate, and regulate intrastate commerce.

We respectfully submit that it is clear, under the Constitution of the United States and the decisions of the Supreme Court of the United States, that the right to regulate interstate commerce is vested in the Congress of the United States, and that when it legislates on the subject of interstate commerce its legislation is the expression of the paramount power before which the State legislation fails; that it is equally true that the right is reserved to the several States in the Union to regulate intrastate commerce, and that the Congress of the United States cannot invade or destroy this right; that the Congress of the United States has legislated fully and completely in the matter of regulation of interstate commerce by railroads, and that neither the State of Texas, nor any other State, has the power or authority, by constitution or statute, to authorize or require a railroad corporation, incorporated by it, to engage in interstate commerce; that the Federal Government has legislated fully on the subject of interstate commerce by railroad, and that any railroad incorporated under the laws of the State of Texas, or any other State, can obtain authority to engage in interstate commerce only by complying with the requirements of the Federal legislation on that subject.

We respectfully submit, further, that there is no merit in the contention that the statutes of the State of Texas, cited by counsel for plaintiff, authorize, empower, or require railroads incorporated under the laws of the State of Texas to engage in interstate commerce, but that, on the contrary,

the only authority such railroads obtain by virtue of the charter granted by the State of Texas is to engage in intrastate commerce, and that all railroads incorporated under the laws of the State of Texas are, in fact, prohibited from engaging in interstate commerce unless and until they comply with the requirements of the paramount law on the subject of interstate commerce, under the act of Congress of the United States known as the Interstate Commerce Act.

We have never taken, and do not now, take the absurd position which counsel for plaintiff accredits to us, that the only way in which a railroad built after the passage of the Act of 1920 can become subject to the Act of 1920 is by violating the Interstate Commerce law and moving interstate commerce without filing tariffs. On the contrary, our contention is that if it was the purpose and intention of the Asphalt Belt Railroad to engage in interstate commerce, it would be its duty, under the Interstate Commerce Act, to make application for and obtain a certificate of necessity, and, after granting of that certificate of necessity and the construction of the railroad, to in all other things comply with the Interstate Commerce Act. We do contend, however, that the State of Texas has the authority to incorporate a railroad to be constructed wholly within the State of Texas, and that such a railroad is authorized by its charter to engage in intrastate commerce only, and that if it is the only declared purpose and intention of that railroad company to engage in intrastate commerce, as its charter authorizes it to do, no Court is authorized to assume that it has in fact a concealed purpose to violate the terms and conditions of the Interstate Commerce Act, or to engage in interstate commerce contrary to provisions of the Interstate Commerce Act, and

to declare it to be an interstate carrier subject to the Act to Regulate Interstate Commerce, either on the assumption that it has a concealed purpose, contrary to its avowed purpose, to engage in interstate commerce in violation of the law or upon the presumption that some agent or officer of the railroad company may some time, without the purpose or intention of violating the Interstate Commerce Act, haul over the line of the railroad an interstate shipment moving on reconsignment and local billing.

We have always understood that a Court should indulge the presumption that it is the purpose of a litigant before the Court to comply with the law rather than violate it, and we know of no case where a Court has indulged the presumption contrary to the avowed intention of the party before the Court, that it was his concealed purpose to violate the law.

We further submit that the proposition that this Court should indulge the presumption that it is the intention of the defendant railway company to violate the law, or that it may at some time innocently handle an interstate shipment without knowing its interstate character, and, therefore, hold it to be a carrier subject to the Act to Regulate Commerce, has a still more serious effect, and that is it strikes down the constitutional right and power of the State of Texas to promote and encourage the development of intrastate commerce and the incorporation of transportation companies for that purpose, and in effect relegates to a Federal agency, the Interstate Commerce Commission, full power and authority over a matter of purely local concern, which the Supreme Court of the United States has said the Congress of the United States by its enactments did not intend; and if such construction is put upon the enactment of the

Congress of the United States, the constitutionality of such enactments are doubtful, to say the least.

We respectfully pray that the judgment of the trial court be affirmed.

R. J. BOYLE,
G. W. WHARTON,
MASON WILLIAMS,
J. D. WHEELER,
*Attorneys for Appellees.*

SAN ANTONIO, TEXAS, *October* 18, 1923.

(5241)

End

# SMYTH ET AL. *v.* ASPHALT BELT RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, PURSUANT TO THE ACT OF CONGRESS OF SEPTEMBER 14, 1922.

No. 206. Argued January 20, 1925.—Decided March 2, 1925.

1. The propriety of a transfer of a case from the Circuit Court of Appeals will be inquired into by this Court of its own motion. P. 327.
2. A decree of the District Court dismissing a bill "for lack of jurisdiction" but in the absence of any challenge of the court's jurisdiction as a federal court, and based upon a conclusion, after full hearing upon pleadings and evidence, that the acts sought to be enjoined were not violative of rights claimed by the plaintiff under a federal statute,—*held*, not to involve the jurisdiction of the District Court as a federal court, and not appealable directly to this Court, but to the Circuit Court of Appeals. P. 328.
3. When the District Court lacks jurisdiction as a federal court it is without power to impose costs on the plaintiff. P. 330.

292 Fed. 876, returned to the Circuit Court of Appeals.

APPEAL from a decree of the District Court which dismissed a bill by which the appellants sought to enjoin condemnation of their land for railway purposes. The case was transferred to this Court by the Circuit Court of Appeals, to which the appeal was taken. It is now returned to that court.

*Mr. Robert H. Kelly,* with whom *Mr. T. W. Gregory* and *Mr. Frank Andrews* were on the brief, for appellants.

*Mr. Mason Williams* and *Mr. J. D. Wheeler,* with whom *Mr. R. J. Boyle* and *Mr. G. W. Wharton* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from a decree of the federal court for western Texas which dismissed a bill in equity with costs. There was a full hearing upon pleadings and evidence. The plaintiffs had moved for an interlocutory injunction; the defendants to dismiss the bill. 292 Fed. 876. The decree recited, as the ground for dismissal, "that the court is without jurisdiction." The plaintiff took an appeal to the Circuit Court of Appeals, assigning fifteen errors, of which only a few referred in any way to jurisdiction. The appellate court was of opinion that, under the rule declared in *United States* v. *Jahn,* 155 U. S. 109, it was without jurisdiction, because the jurisdiction of the District Court had been challenged and the decision there was in favor of the defendants. The Court of Appeals, therefore, transferred the case to this Court, pursuant to the Act of September 14, 1922, c. 305, 42 Stat. 837. See *McMillan Contracting Co.* v. *Abernathy,* 263 U. S. 438. Whether the transfer should have been made is the preliminary question requiring decision, although not raised by counsel. *Smith* v. *Apple,* 264 U. S. 274, 275.

If the jurisdiction of the District Court as a federal court was the question there in issue, and was the only question, it is clear that, under § 238, this Court alone had jurisdiction of the appeal, *Chappell* v. *United States,* 160 U. S. 499, 508; *The Carlo Poma,* 255 U. S. 219, and it was proper to transfer the case, *Hoffman* v. *McClelland,* 264 U. S. 552. But if the question, called one of juris-

diction by the lower courts, was not, in fact, a question of the jurisdiction of the federal court as such, but whether the action complained of violated a federal law, *Louie* v. *United States*, 254 U. S. 548; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 304–308, or whether a power possessed by the court should be exercised, *Smith* v. *Apple*, 264 U. S. 274; *Oliver American Trading Co., Inc.* v. *Mexico*, 264 U. S. 440, then the appeal was properly taken to the Circuit Court of Appeals.

The proceedings in the District Court, including its opinion and decree, and the briefs filed in this Court, show that at no time was the jurisdiction of the trial court as a federal court questioned there; and that its jurisdiction as a federal court was clear. The suit was brought as one "arising under the Constitution and Laws of the United States" and particularly under the Act to Regulate Commerce as amended. The sum involved was alleged to exceed three thousand dollars exclusive of interest and costs. All the defendants were alleged to be citizens and residents of the district. All were duly served. All appeared generally, answered and introduced evidence. The motion to dismiss assigned the grounds therefor; and lack of jurisdiction of the court as a federal court was not one of them. Lack of merits, lack of equity, and lack of that status which alone would entitle a private individual to sue were the objections urged. Lack of jurisdiction over the subject matter was also asserted in terms, but the pleadings and the opinion of the District Court show that this expression was not intended as a challenge of the jurisdiction of the court as a federal court, but as a denial of fundamental allegations in the bill essential to a cause of action and to the relief under the federal statute invoked.

The bill alleged that the plaintiffs owned a tract of land in Texas; that the two corporate defendants, and another defendant, who was the receiver of one of them, were

purposing to construct a railroad across the land; that, to this end, they were proceeding under a statute of the State to condemn, in the name of one of these corporations, a right of way over the land; that the proposed railroad is in fact an extension of the line of the other railroad corporation which is engaged in interstate commerce; that the new line is intended to be used in interstate commerce and that, irrespective of intention, it will be required by the laws of Texas to be open to such commerce; that it cannot legally be constructed without there first having been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity as provided in paragraphs 18 to 20 of § 1 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478; that the proposed condemnation of plaintiffs' land was undertaken without first having secured such certificate; and that this action violates plaintiffs' rights under the federal statute. The District Court said in its opinion:

"Since the plaintiffs' right to injunction rests upon provisions of an Act of Congress regulating interstate commerce, the Court would be without jurisdiction unless the facts show: (1) That the Asphalt Belt Railroad Company is owned and controlled by the San Antonio, Uvalde & Gulf Railroad Company, an interstate carrier, thus constituting it an extension and branch of the latter road, or (2) that the A. B. Company is obliged by law, and its purpose is, to carry on business as an interstate carrier.

The trial court found, on the evidence and as matter of law, that the railroad which had instituted and brought condemnation proceedings was an independent intrastate carrier; that it was not obliged to conduct an interstate business; and that, hence, its action in instituting condemnation proceedings, without first obtaining a certificate from the Interstate Commerce Commission, was

not in contravention of the federal law. It is on this ground, and this only, that the District Court declared the bill should be dismissed for lack of jurisdiction; meaning obviously that, upon the facts found, it was not warranted in enjoining the condemnation proceedings, and not that as a federal tribunal it was without power to entertain the suit and inquire into the matters alleged in the bill.

This conclusion is confirmed by the fact that the plaintiffs were ordered to pay "all costs." If the District Court had lacked jurisdiction as a federal court, it would have been without power to order the plaintiffs to pay costs. *Blacklock* v. *Small*, 127 U. S. 96; *Citizens' Bank* v. *Cannon*, 164 U. S. 319.

The cause must be

*Returned to the Circuit Court of Appeals with directions to proceed.*